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SUPREME COURT OF THE UNITED STATES

October Term, 1932

No. 301

LOUIS K. LIGGETT COMPANY,
a Corporation, et al.,
Appellants,

vs.

ERNEST AMOS, as Comptroller of
the State of Florida, et al.,
Appellees.

BRIEF FOR APPELLANTS.

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Floridian Press, Jacksonville, Fla.

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BRIEF FOR APPELLANTS.

NATURE OF CASE.

This is an appeal by Appellants, as Plaintiffs and Intervenors below, from a final judgment of the Supreme Court of Florida, R 148, affirming a final decree of the Circuit Court, in and for Leon County, Florida, R 101, which dismissed on motion of Appellees, R 77, the amended bill of complaint, R 2 to 76, filed by three of the appellants to test the validity of, and restrain the enforcement of, Chapter 15624, Laws of Florida, 1931, also known as the Florida Chain Store License Tax Act.

OFFICIAL REPORT.

Both Florida Courts held the Act valid as against all attacks made in the amended bill and petitions of intervention. The Justices of the Supreme Court of Florida were divided in their opinions, four to two. The majority and dissenting opinions appear R 105, to 147, and are officially reported as

Louis K. Liggett Company v. Amos, 141 So. 153 to 171.

STATEMENT OF CASE.

1. Florida Act.

Chapter 15624, Laws of Florida, 1931, imposes certain state and county occupational license taxes, and authorizes certain municipal occupational license taxes, graduated upon ascending scales, dependent upon the number of stores opened and operated, (1) entirely in a single county, and (2) in different counties, where a penalty is attached on companies that operate in more than one county. A copy of the Act is shown by Appendix A to this brief.

The definition of a "store" is found in section 8 of the Act. That section makes the unit of taxation a *place* where goods, wares or merchandise are sold *at retail*. According to this statutory definition, peanut stands or bootblack stands are such places or "stores", the same as large department stores.

The retail store operators upon whom the taxes are im-

posed are defined first in section 7 of the Act.

The application of the Act is further defined by section 5 of the Act, reading in part as follows:

> "Every person, firm, corporation, association or copartnership opening, establishing, operating or maintaining one or more stores or mercantile establishments within this State, under the same general management, supervision or ownership, shall pay the license fee hereinafter prescribed for the privilege of opening, establishing, operating or maintaining such stores or mercantile establishments."

Multiple Ownership—Chain Store Ownership—is made the test of application if there is any operation of more than one retail unit. Thus the Act is made inapplicable to groups of "stores" *separately owned*, even though the units of such groups are affiliated with a wholesaler and act cooperatively in what are known as "Voluntary Chains."

Sub-sections or Brackets (1), (2), (4), (6), (8) and (10) of Section 5 of the Act impose a graduated State License Tax, ranging from $5.00 for the operation of one "store," up to $40.00

> "upon each store in excess of seventy-five, where all are located in *one* County."

Sub-sections or Brackets (1), (3), (5), (7), (9) and (11) of Section 5 of the Act impose a graduated State License Tax, ranging from $5.00 for the operation of one "store," up to $50.00

"upon each store in excess of seventy-five, where the same are located in *different* counties."

The last clause of section 5 of the Act, and another clause about the middle of section 2 of the Act, impose an additional State License Tax of $3.00

"for each and every One Thousand Dollars of value of stock carried in each store or for sale in such store."

The words "for sale in such store," at the end of section 5 of the Act, are explained by section 2 of the Act, requiring the applicant for a license to show the value of all goods

"owned by the applicant and held in storage to be sold in or through such store."

Section 8 of the Act, as before noted, confines its operation to *retail* stores, and, therefore, the ordinary wholesaler, though operating as a part of a "Voluntary Chain," remains subject only to $1.50 per thousand dollars of value of stock carried in his or its warehouse or warehouses, pursuant to § 1197 Compiled General Laws of Florida, 1927 (§ 926 Revised General Statutes of Florida, 1920).

Section 11 of the Act imposes county taxes to the extent of twenty-five per cent. of the combined State License Taxes, and authorizes Municipal License Taxes to the extent of twenty-five per cent of the combined State License Taxes. The twenty-five per cent County Tax so required,

and the twenty-five per cent municipal tax so authorized, are to be graduated on the scale defined for State License Taxes where all stores are operated in one County—that is to say, on the scale defined by sub-sections (1), (2), (4), (6), (8) and (10), of section 5 of the Act. But the scale so to be applied must be confined to the stores in each County or City, as the case may be. It thus appears that the required county license taxes and the authorized municipal license taxes are cumulative and pyramided upon the same scheme as that defined for State License Taxes—in each case the greater the number of stores the greater the discrimination.

The latter part of section 4 of the Act provides a civil penalty of twenty-five per cent for failure to procure licenses within the times required.

Section 9 of the Act provides criminal penalties, and makes each day's violation a separate offense.

2. The Record in Effect Presents a "Stipulated Case."

The sworn facts set up in the amended bill, R 2 to 76, and in the petitions of intervention, R 84, R 89 and R 97, were not denied by the appellee officials by any form of affidavit, answer or other such pleading. On the contrary, the appellees merely filed a motion to dismiss, R 77, and thereby admitted as true all matters well pleaded in the amended bill.

Payne v. Central Pacific R. Co.,
255 U. S. 228, 232;

Street v. Lincoln S. & D. Co.,
254 U. S. 88, 89,

and other cases cited in appellants' petition for rehearing, filed before the Supreme Court of Florida, R 149-150.

The Florida equity practice in that behalf is the same as the Federal equity practice, because in 1931 Chapter 14658 was passed adopting very largely the Federal Equity Rules. Section 33 of that Act is a modified form of Rule 29 Federal Equity Rules. As to the effect of the motion to dismiss, Mr. Justice BROWN, of the Supreme Court of Florida, said in this case, R 145 (141 So. text 170):

> "The motion to dismiss the amended bill in this case, like a demurrer, admits all facts well pleaded in the amended bill. Taking these facts as true, as we must in reviewing the action of the lower Court on the motion to dismiss, my conclusion is that the Court below erred in granting such motion and in denying the temporary restraining order."

3. Matters of Law and Fact Presented by the Amended Bill and Petitions of Intervention.

Discriminations appearing upon the face of the Florida Act in derogation of the 14th amendment, are specifically set out in section VII. (a) to (f) of the amended bill, R 14 to 19.

The Florida factual situation, as of the date of this

suit, is set forth in other sections of the amended bill and in the several petitions of intervention.

Section III. of the amended bill, R 4, and corresponding sections of the several petitions of intervention, show the number of stores operated by the several appellants in different counties of the State.

Section IV. of the bill, R 5, shows the legislative history of the Act.

Sections V. and VI. of the amended bill, R 8 to 14, state briefly the historical development of chain stores, and the efforts made by chain store owners to keep pace with changing economic conditions.

Section VIII. of the amended bill, R 19, and section IX. (Erroneously numbered XX.) R 22, show how Louis K. Liggett Company operates its twenty-two retail drug stores in Florida, and how its competitors operate as single store owners, or as affiliated in "Voluntary Chains."

Section X. of the amended bill, R 25, and section XI. of the amended bill, R 27, show how the appellant, Winn & Lovett Grocery Company operates its fifty-eight retail grocery stores in Florida, and how its competitors operate, either as single store operators, or as affiliated in "Voluntary Chains."

Section XII. of the amended bill, R 35, shows how the appellant, Paxson's Inc. operates its seven Florida retail shoe stores, and one Georgia retail shoe store, and how its competitors operate.

Section XIV. (a) to (o) of the amended bill, R 37, shows great diversity of operation among chain store owners, and that no one practice of operation can be found applicable to all chain stores alike. That operating practices

utilized by appellants severally, and capable of local application to their Florida retail units, are now being employed by single store owners, and also by singly owned stores affiliated in "Voluntary Chains." That no taxable difference can be found in Florida between the chain store units of the appellants severally and the stores of their competitors.

Sections XV. and XVI. of the amended bill, R 49 to 53, show how the appellee Comptroller, and the Attorney General have interpreted the Act and are arbitrarily administering the Act.

Section XVII. of the amended bill, R 54, shows how privileges, or advantages if they can be deemed such, exercised or enjoyed by the appellants severally beyond the limits of the State of Florida, part of which constitute interstate commerce, are being burdened and unlawfully taxed by the provisions of the Florida Act.

Section XVIII. of the amended bill, R 56, shows that the appellants tendered to the appellee tax collectors the taxes payable under the law existing at the time the Act under attack was passed, viz. § 1197 Compiled General Laws of Florida 1927, but that said appellee tax collectors refused to accept the same, and that they and the appellee Comptroller are threatening civil and criminal penalties.

The several petitions of intervention, R 84, R 89, and R 97, adopted the averments of the amended bill, and, in addition, set forth the particular situation of each intervenor.

4. **No Question as to Equity Jurisdiction.**

The Circuit Court in and for Leon County, Florida,

and the Supreme Court of Florida, treated the amended bill as a class suit, properly filed in equity, to test the validity of the Act. Section 14 of Chapter 14658, Laws of 1931, the new Florida Equity Practice Act, is the same as Federal Equity Rule 38. The majority opinion, R 105, 141 So. 154, expressly held that the bill was properly filed under section 14 of the new Florida Equity Practice Act. The dissenting opinion of Mr. Justice BROWN, bottom R 124, (141 So. text 162, middle first column), held to the same effect.

The motion to dismiss, R 77, attacked the amended bill on its merits, and contended, notwithstanding the sworn facts alleged, that the Act was valid in all respects.

The propriety of the procedure under State law having been thus expressly recognized and conceded, the question of whether the Florida Courts had equity jurisdiction to consider the merits of the questions raised was set at rest, and is not here open for further consideration.

First Natl. Bank v. Anderson,
269 U. S. 341, 70 L. ed. 295, 2 h. n.

5. **Florida Court's Opinion Predicated Upon Alleged Judicial Notice.**

The majority opinion of the Supreme Court of Florida, R 105 to 121 (141 So. text 158), was predicated upon what the majority opinion announced was judicially known to be the facts. In so doing, the Court disregarded the sworn facts set up in the amended bill and petitions of intervention. The error of the Supreme Court of Florida in that behalf was sharply brought to that Court's attention by

the first section of appellants' petition for rehearing, now appearing R 148 to 153.

6. This is a Several Appeal.

The Appeal to the Supreme Court of Florida, R 102, was a several appeal. In like manner, the appeal to this Court, R 160 to 165, is a several appeal. In like manner, the assignments of error, R 172 to 176, are presented on behalf of the appellants severally. It follows, therefore, that each appellant is entitled to have this appeal considered as if each such appellant was the only party complaining.

QUESTIONS INVOLVED AND SPECIFICATIONS OF ERRORS RELIED UPON

Point 1.

DIFFERENT COUNTY OR COUNTY LINE DISCRIMINATIONS.—As applied to the Factual Situation Presented, the Supreme Court of Florida erred in Sustaining the Validity of Sub-sections (1), (3), (5), (7), (9) and (11), of § 5 of the Act, creating Arbitrary and Unreasonable State License Discriminations between Appellants, severally doing business in different Counties, and other Merchants, Single Store or Chain Store, confining their businesses to single Counties, Contrary to the Due Process Clause, and the Equal Protection of the Laws Clause of the 14th Amendment.

This is in substance the 3rd and 15th assignments of error, R 172 and R 176. The third assignment of error complains that the holding of the Supreme Court of Florida as last aforesaid violates both the due process clause and the equal protection of the laws clause. The fifteenth assignment of error complains that such discrimination, based on county lines only, violates the equal protection of the laws clause.

Point 2.

CHAIN STORE WAREHOUSE DISCRIMINATION.—As Applied to the Factual Situation presented by the Amended Bill and Petitions of Intervention, the Supreme Court of Florida erred in sustaining the Discrimination created by §§ 8, 5 and 2 of the Act, imposing a license Tax of $3.00 per $1,000.00 of value on Goods carried in the Warehouses of some of the Appellants, while Wholesale Merchants, though affiliated as Parts of "Voluntary Chains," remain subject to the old Law, requiring the Payment of only $1.50 per $1,000.00 of value on their Stocks—Contrary to the Due Process Clause and Equal Protection of the Laws Clause of the 14th Amendment.

This is in substance the fifth assignment of error, R 173.

Point 3.

COUNTY AND MUNICIPAL LICENSE DISCRIMINATIONS.—As applied to the Factual Situ-

ation Presented, the Supreme Court of Florida erred in Sustaining the Validity of Section 11 of said Act, imposing Cumulative, Discriminatory County License Taxes, and Authorizing Discriminatory Municipal License Taxes—Contrary to the Due Process Clause and Equal Protection of the Laws Clause of the 14th Amendment.

This is in substance the fourth assignment of error, R 173.

Point 4.

ARBITRARY ADMINISTRATION OF THE ACT.—The Supreme Court of Florida erred in Sustaining the Comptroller's Arbitrary and Discriminatory Administration of the Act, whereby he undertook to Exempt Furniture Dealers, Filling Stations that sell Tires and Tubes, Automobile Dealers, Cigar Stores, Restaurants, and other Classes of Store Operators, regardless of whether Single Store Operators or Chain Store Operators—Contrary to the Due Process Clause and Equal Protection of the Laws Clause of the 14th Amendment.

This is in substance the 8th assignment of error, R 174.

Point 5.

ACT VOID IN ITS ENTIRETY.—As Applied to the Factual Situation Presented by the Amended Bill and Petitions of Intervention, the Supreme Court of Florida erred in sustaining Chapter 15624 in its Entirety.

This is in substance the 1st, 10th, 11th and 12th assignments of error, R 172 and R 175. The first assignment of error, R 172, complains generally of the holding of the Supreme Court of Florida, sustaining the Act in its Entirety, notwithstanding the several assaults made thereon in the amended bill and petitions of intervention. The tenth assignment of error, R 173, makes the same general complaint predicated upon the due process clause only. The eleventh assignment of error is the same, except that it is predicated upon the equal protection of the laws clause. The twelfth assignment of error makes the same general complaint on account of the discriminations created by the Act as applied to the number of stores located in any one County.

Point 6.

COMMERCE CLAUSE AND EQUAL IMMUNITIES CLAUSE VIOLATED.—As Applied to the Factual Situation Presented, the Supreme Court of Florida erred in Sustaining the Validity of said Act as against the Objections that the same Operates to burden Interstate Commerce conducted by Appellants Severally, and operates to deprive Appellants Severally of the same Privileges and Immunities enjoyed by Citizens of the State of Florida—Contrary to the Commerce Clause, § 8, Art. I., and contrary to the Equal Privileges and Immunities Clause, § 2, Art. IV. of the Federal Constitution.

This is in substance the seventh assignment of error,

R 174. It is also substantially Point 6 of the "Jurisdictional Statement," pages 11 and 12 thereof, heretofore filed in this cause.

Point 7.

SINGLE COUNTY STATE LICENSE DISCRIMINATIONS.—As Applied to the Factual Situation set up in the Amended Bill and Petitions of Intervention, the Supreme Court of Florida erred in sustaining the Validity of Sub-sections (1), (2), (4), (6), (8) and (10), of § 5 of the Act, creating Arbitrary and Unreasonable State License Discriminations in favor of Single Store Retail Merchants, and against Chain or Multiple Store Retail Merchants, all doing business in one County—Contrary to the Due Process Clause and the Equal Protection of the Laws Clause of the 14th Amendment.

This is in substance the 2nd, 13th and 14th assignments of error, R 172 and R 176. The second assignment of error complains that said holding violates the due process clause and equal protection of the laws clause. The thirteenth assignment of error complains of single county discrimination as in violation of the equal protection of the laws clause only. The fourteenth assignment of error complains of such single county discrimination as in violation of the due process clause.

Point 8.

DAY IN COURT DENIED.—The Supreme Court of Florida Erred by its Majority Opinion in

Predicating its Judgment upon alleged Judicial Notice, in Disregard of the Sworn Facts set up in the Amended Bill and Petitions of Intervention, admitted by Appellees' Motion to Dismiss, thereby depriving Appellants severally of their Day in Court—Contrary to the Due Process Clause of the 14th Amendment.

This is in substance the 9th and 16th Assignments of Error, R 174 and R 176. This Point is also the substance of Points 9 and 10, pages 13 to 15, of the "Jurisdictional Statement," heretofore filed in this cause.

ARGUMENT

Point 1.

DIFFERENT COUNTY OR COUNTY LINE DISCRIMINATIONS.—As applied to the Factual Situation Presented, the Supreme Court of Florida erred in sustaining the Validity of Sub-sections (1), (3), (5), (7), (9) and (11) of Section 5 of the Act, creating Arbitrary and Unreasonable State License Discriminations between Appellants, severally doing business in different Counties, and other Merchants, single store or chain store, confining their businesses to Single Counties, Contrary to the Due Process Clause, and the Equal Protection of the Laws Clause of the 14th Amendment.

This County line discrimination, its operation and ef-

fect, were complained of in § VII. (b) of the amended bill, R 15, in § IX. of the amended bill, R 22, in § XI. of the amended bill, R 27, and in the several petitions of intervention. Those matters, like others well pleaded, were admitted by the motion to dismiss. The adverse ruling of the Supreme Court of Florida on this point is the subject-matter of the 3rd and 15th assignments of error, R 172 and R 176.

All of the appellants operate stores in different counties of Florida except Montgomery Ward & Company, and, if its freedom of contract is to be preserved, it is entitled to open other stores in different counties of the State, if it so desires, without being subject to arbitrary and unreasonable discriminations in the matter of license taxes, and, therefore, that appellant has the same right to complain of the county line discriminations as each of the others.

(1) *Illustrations of How the Brackets of § 5 of the Act Operate.*

It is shown by the amended bill, § VII. (b), R 14 to 19, that one George C. Blume operates in Duval County, Florida, thirty-seven retail grocery stores known as "Whiddon Stores," and operates no store in any other part of the State. To apply brackets (1), (2), (4) and (6) of § 5 of the Florida Act to his stores, we get the following as the arbitrary state license fees to be paid, exclusive of the $3.00 per $1,000.00 on stock carried, as required by the lasf sentence of § 5 of the Act, and exclusive of the county and municipal license taxes further required by § 11 of the Act:

TABLE 1—(Single County)

1	Store	$ 5.00
14	Stores at $10.00	140.00
15	Stores at $15.00	225.00
7	Stores at $20.00	140.00
37	Stores, total	$510.00
	Average per Store	$13.78

But suppose Mr. Blume concludes to open one additional store in an adjoining County, that is to say, in the City of Fernandina, or in the City of St. Augustine, thereby giving him thirty-eight (38) stores, the original thirty-seven in Duval County, and the one additional store in a different County. In that case the Act requires the application of sub-sections (1), (3), (5) and (7) of § 5, and the Table would be as follows:

TABLE 2—(Different Counties)

1	Store	$ 5.00
14	Stores at $15.00	210.00
15	Stores at $20.00	300.00
8	Stores at $30.00	240.00
38	Stores, total	$755.00
	Average per Store	$19.60

It is thus seen that the average per store would be increased from $13.78 to $19.60, or almost one-half, and that the total increase, by reason of establishing one store across the County line, would be $245.00. In other words, Mr. Blume, in order to enlarge his business by one additional store, if set up in an adjoining County, or even in a

distant County, must pay *forty-nine* times as much arbitrary state license fee for the privilege of opening that one additional store as is required of the merchant who would be his competitor across the street in the new location. This is the inescapable result if we charge all of the increase to the one additional store; but if we distribute the increase, then the burden becomes *retroactive* upon all of the original thirty-seven stores to make the burden thereof equal to that imposed upon the one new store opened in a different County.

It also appears from Exhibit 3 to the amended bill, R 63, that Winn & Lovett Grocery Company owns and operates in the City of Jacksonville, Duval County, 23 grocery stores. Suppose that the Winn & Lovett Grocery Company operated 225 stores in the City of Jacksonville, and that it owned and operated no store in any other part of the State of Florida? The Florida Act would then require the application to the business of Winn & Lovett Grocery Company of sub-sections (1), (2), (4), (6), (8) and (10) of Sec. 5 of the Act, and we would get the following Table to determine the arbitrary state license fee payable:

TABLE 3—(Single County)

1	Store	$ 5.00
14	Stores at $10.00	140.00
15	Stores at $15.00	225.00
20	Stores at $20.00	400.00
25	Stores at $30.00	750.00
150	Stores at $40.00	6000.00
225	Stores, total	$7520.00
	Average per Store	$33.42

Suppose again, that having 225 stores in Duval County, the Winn & Lovett Grocery Company desired to open one additional store in the adjoining county of St. Johns, or in some distant County of the State of Florida. In that case the Act would require the application of sub-sections (1), (3), (5), (7), (9) and (11) of Sec. 5, in order to determine the arbitrary state license fees required and we would get the following Table:

TABLE 4—(Different Counties)

1	Store	$ 5.00
14	Stores at $15.00	210.00
15	Stores at $20.00	300.00
20	Stores at $30.00	600.00
25	Stores at $40.00	1000.00
151	Stores at $50.00	7550.00
226	Stores, total	$9665.00
	Average per Store	$42.76

It is thus seen that by opening one new store in a different County the average per store would be increased from $33.42 per store arbitrary state license fee, to $42.76 per store, such increase operating *retroactively* upon the original 225 stores in the one County so as to make their average equal to that of the one new store established in a different County. If such retroactive distribution be not considered, then the total arbitrary state license fee taxable by reason of opening the one additional store in a different County is the difference between $7520.00 and $9665.00, or the prohibitive sum of $2145.00. In short, the Company would have to pay for the privilege of opening

one new store across the County line *four hundred and twenty-nine* times as much arbitrary state license fee as would be required of its competitor across the street from such store opened in a different County.

We may further illustrate the discrimination between two merchants both of whom are multiple store owners. Suppose Merchant Jones has three stores located in the villages of A, B and C in one County, at distances five miles apart. Merchant Smith has stores in towns B, C and D, also each five miles apart; but towns A, B and C are in one County and village D is over the county line. Merchant Jones pays $25.00, $5.00 for the first store and $10.00 each for the other two, an average of $8.00 and a fraction. Merchant Smith pays $35.00, $5.00 for the first store and $15.00 for the other two, an average of nearly $12.00 or 1½ times as much. Merchant Jones' stores may be located on good corners, occupy large spaces, carry large stocks, and do a $100,000.00 volume a year each. Merchant Smith's stores may be in poor sections, occupy very little space, and do a volume of $20,000.00 a year each. Merchant Jones' stores may be in the large cities of A, B and C, in one County, and may be large central stores. Merchant Smith's stores may be in the smallest country settlements, in one room shacks, and be simply little community trading places. Yet for the great privilege of having his stores in two different Counties Merchant Smith pays nearly 50% more tax. As you rise in the brackets the discrimination becomes worse, and the reason for it less apparent.

The argument on the county line discrimination makes itself. This is not classification based on any principle,

reason or logic; it is classification and discrimination gone wild. No inspection is required by the Act; no additional duties are imposed upon officials by reason of doing business in different counties. An Applicant for a license, doing business in different counties, makes his application to a single official, the Comptroller, instead of to the several Tax Collectors of the different counties. The Comptroller takes the money, issues the license and that is the end of the matter until the next taxpaying period arrives. The addition of a new store or stores in different counties cannot possibly justify more than the addition of per unit license fees. No possible justification can be found for retroactive increases on all of the original stores which may be in a single County, as required by sub-sections (3), (5), (7), (9) and (11) of section 5 of the Act.

It is obvious that the purpose, effect and operation of such license provisions are to prohibit or to deter any merchant from doing a retail business in more than one County of the State, and also to prohibit or to deter any merchant from doing a retail business under more than one roof in a single county. It is thus apparent that the Act is rank anti-chain store legislation—that its real purpose, under the guise of taxation, is the suppression of chain store retail distribution.

In the case of

Minnesota v. Barber, 136 U. S. 320,

it is said:

"The rule is general, with reference to the enact-

> ments of all legislative bodies, that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferrible from their operation, considered with reference to the condition of the country and existing legislation . . . It is our duty to inquire, in respect to the statute before us, not only whether there is a real or substantial relation between its avowed objects and the means devised for attaining those objects, but whether by its necessary or natural operation it impairs or destroys rights secured by the Constitution of the United States."

In the

Child Labor Tax Case, 259 U. S. 20, 37,

it is said:

> "In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?"

(2) *Authorities Relied Upon.*

After diligent search we have been unable to find any decided case, State or Federal, where such a scheme of license taxation was involved, based, as this one is, on artificial county lines. Such a scheme of discrimination appears to be one of first impression, and therefore, we must needs resort to merely analogous cases, to find applications of the due process clause and the equal protection of the laws clause that will condemn such form of discrimination.

In the case of

Great Atlantic & Pacific Tea Company v. Doughton, 144 S. E. 701,

the North Carolina Court condemned the North Carolina chain store statute of 1927, which required the payment of a license tax of $50.00 per store on all stores if more than five were operated. The North Carolina Court cited in that case the applications of the 14th Amendment made by this Court in

Louisville Gas & E. Co. v. Coleman,
277 U. S. 32; and
Quaker City Cab Co. v. Pennsylvania,
277 U. S. 389.

The chief cause for the Carolina's Court's condemnation of the statute there involved was that after the imaginary line between five stores and six stores was crossed, the Act became *retroactive* on the original five stores

owned. In that sense the statute there condemned is analogous to the imaginary county line discrimination here under consideration, and the statute here should be condemned for like reasons. Precisely the same situation was involved in the Georgia case of

F. W. Woolworth Co. v. Harrison (Ga.)
156 S. E. 904.

The Georgia Statute there condemned also provided that when the imaginary line between five stores and six stores was crossed the fee of $50.00 per store would become *retroactive* on the original five stores. So here, when either Blume, or any other merchant now doing a chain store business in one County, opens a new store in another County, the very great increase in license taxation will immediately become retroactive on all of the original stores operated in the first County.

The nearest approach in the decisions of this Court which we have been able to find, applicable to the *county line* discriminations now under consideration, are *state line* discriminations, condemned in the following cases.

Ward v. Maryland, 12 Wall. 418, 429, 430, 431, 432, involving traders' or merchants' license tax—$12.00 to $150.00 per annum for residents, and $300.00 per annum for non-residents.

Caldwell v. North Carolina, 187 U. S. 622, 626, 627, involving drummers' license tax.

Minnesota v. Barber, 136 U. S. 313, 320, 326, involving meat inspection requirements.

Chalker v. Birmingham, Etc. R. Co. 249 U. S. 522, involving contractors' license—$25.00 for residents and $100.00 for non-residents.

Bethlehem Motors Corp. v. Flynt, 256 U. S. 421, involving license tax on automobile manufacturers, or persons or corporations engaged in selling the same, but discriminating against non-residents who did not invest a certain amount in securities of the State, or of its sub-divisions.

Fidelity & Deposit Co. v. Tafoya, 270 U. S. 426, requiring insurance companies to pay commissions, on business done in the State, only to residents of the State.

In some of these cases, such as Bethlehem Motors Corporation v. Flynt, the Court condemned the tax as being in derogation of the immunities and equal privileges clause, of § 2, art. IV. of the constitution, and as being in derogation of the equal protection of the laws clause of the 14th amendment. Both of those clauses have the same object in view as the Commerce Clause, sec. 8, art. I., i. e. that so far as domestic trade relations are concerned, no discrimination shall be created in favor of one part of the citizens against another; that all commercial relations, whether intrastate or interstate, shall be free and without restriction; that in such commercial relations no one of the same class shall have a "law made advantage" over another.

The recent decision of this Court in

New State Ice Company v. Liebmann, 52 S. Ct. 371, 76 L. ed. 477,

restates principles which we think are applicable to the kind of discriminations now under consideration. The Court there condemned an Oklahoma Statute undertaking to vest in the Corporation Commission the right to issue a permit for the manufacture of ice only upon proof that such additional plant was a matter of public convenience and necessity. The sixth headnote of that case (L. ed.) reads:

> "The State has no power, under the 14th Amendment, arbitrarily to deny or unreasonably to curtail the common right to engage in a lawful private business, such as the manufacture and sale of ice."

In the course of the opinion the Court observed that the statute

> "does not protect against monopoly, but tends to foster it. The aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it."

Also that the statute operated to

> "arbitrarily interfere with private business or pro-

> hibit lawful occupations or impose unreasonable and unnecessary restrictions upon them."

It seems to us that that precisely defines the effect and operation of sub-sections (3), (5), (7), (9) and (11) of sec. 5 of the Florida Act.

We find several lower Federal Court decisions and a number of state court decisions which are closely analogous, and which have uniformly condemned the character of discrimination under discussion.

In the case of

> Ward Baking Company v. City of Fernandina, (Fla.) 29 Fed. (2) 789,

it appeared that the City of Fernandina, by Ordinance prescribed a scale of license taxes—for bakeries generally $5.00; bakeries outside of the City delivering wholesale within the City $100.00; bakeries outside the City, delivering retail within the City, $150.00; agents for non-resident bakeries, $100.00. The Ward Baking Company operated a bakery in the City of Jacksonville, Florida, and through its agent sold and delivered bakery products in the City of Fernandina, but had no plant or factory in that City. Injunction was sought to prevent the enforcement of the Fernandina Ordinance. The Court sustained the bill, and held the Ordinance, discriminating against the agent of the Jacksonville concern, void, as in derogation of sec. 2, Art. IV. of the Federal Constitution, and in derogation of the due process clause and the equal protection of the laws

clause of the 14th Amendment. In arriving at those conclusions, the Court cited

Ward v. Maryland, 12 Wall. 418; and
Bethlehem Motors Corp. v. Flynt, 256 U. S. 426.

Similar Municipal Ordinances discriminating against non-residents of cities were condemned in

Ex Parte Irish, (Kan.) 250 Pac. 1056,
61 A. L. R. 332;
City of Elgin v. Winchester (Ill.) 133 N. E. 205,
22 A. L. R. 1481,

and in other cases appearing in the A. L. R. Annotations to the two decisions last cited.

In the case of

Northwestern Nat. Insurance Co. v. Lee,
49 Fed. (2) 274,

a 3-Judge Court condemned a statute discriminating against non-resident insurance agents. In

Cooley on Taxation, 4th ed. Vol. 1, § 259,

it is said:

"It is immaterial on what ground the selection is made, whether it be because of residence in

> a particular portion of the taxing district, or because the persons selected have been remiss in meeting a former tax for the same purpose; or because of any other reason; for if the principle of selection be once admitted, limits cannot be set to it, and it may be made use of for the purposes of oppression, or even of punishment. It might also be made use of to give special privileges in the nature of monopolies."

Prior to the decision in this case the Supreme Court of Florida had in several cases, not involving merchants, condemned license taxes where there was discrimination predicated upon County lines. We think the decisions in those cases were sound and ought to control the objection to the County line discriminations now under discussion. Nevertheless the majority opinion of the Supreme Court of Florida in this case departed from its prior decisions of that character, and undertook to apply the decision of this Court in the Indiana case, notwithstanding the fact that the Indiana case involved no such scheme of discrimination. The case of

Harper v. Galloway, 58 Fla. 255, 51 So. 236,

involved a statute requiring residents of the state who were not residents of a particular county to give notice of intention to hunt and pay a license tax, whereas no such notice or license tax was required of residents of that County. Those discriminations were held void as in derogation of the 14th amendment, and as in derogation of similar pro-

visions of the State Constitution. See 9th and 10th headnotes.

In the case of

State v. Bryan, 87 Fla. 56, 99 So. 327,

a similar decision was rendered by the Florida Court, dealing with discriminatory hunting license statutes where the discrimination was predicated upon county lines. In both of these cases it is to be noted that the extent of the discrimination could not be classified as confiscatory, or even prohibitive, and, moreover, neither case dealt with any of the ordinary occupations of life; and yet in each case the statute was condemned because there was a deprivation of the equal protection of the laws.

In the case of

Ex Parte Messer, 87 Fla. 92, 99 So. 330,

the Court condemned a statute which sought to impose burdens and restraints upon persons coming into one county from another county to employ labor. In arriving at the conclusions stated in the 5th, 7th and 9th headnotes, the Court cited and followed

Meyer v. Nebraska, 262 U. S. 390;
Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522;
Coppage v. Kansas, 236 U. S. 1.

It seems to us that those decisions of this Court, so relied upon, are equally applicable to condemn the county line discrimination here complained of.
In the case of

Teuton v. Thomas, 100 Fla. 78, 129 So. 330,

the Court condemned another county line discrimination involved in a stock law applicable to one county, and in support of the decision in that case the Court quoted from State v. Bryan, supra, the following:

> "Classifications by counties or otherwise for the purpose of prescribing regulations or exactions that in effect impose burdens on some of the citizens of the state that in kind or extent are not imposed upon other citizens of the state under practically similar conditions with no conceivably just basis for the classifications or discriminations, constitute a denial to those injuriously affected of the equal protection of the laws in violation of the Fourteenth Amendment to the Federal Constitution."

Justice BROWN and Justice ELLIS of the Florida Supreme Court, thought these prior decisions controlling as to the county line discriminations complained of. See dissenting opinion, R 146-147, and 141 So. Text 171.

(3) *Appellees' Authorities Distinguished.*

No such character of discrimination was involved in the Indiana case, 283 U. S. 527, or in the North Carolina case, 154 S. E. 838, affirmed by this Court per curiam, 52 S. Ct. 26. Therefore, the appellees can get no comfort from either of those decisions in undertaking to sustain the kind of discrimination now under review.

In the Court below, as the 10th ground of the motion to dismiss indicates, R 77, counsel for appellees contended that the statute in question in all its provisions must be sustained, because it is "geographically uniform" in its operation, and to support that contention, counsel for appellees relied upon

Sheip Co. v. Amos, 100 Fla. 863, 130 So. 699,

and cases cited in the opinion. In the Sheip case the Court sustained an excise tax on the storage of gasoline, and the tax was sustained on three grounds: (1) That gasoline is highly inflamable and its storage needs to be regulated—hence a police regulation; (2) that the excise tax on the storage of gasoline, even for private uses, after having been brought into the State in interstate commerce, was necessary in order to equalize the burden between parties so storing gasoline, and others who buy gasoline in the open market, and accordingly pay the excise tax charged or collected by filling stations; (3) that the excise tax on the privilege of storing was applicable to all who might desire to store gasoline, without any geographical discrimination or otherwise. The Florida Statute imposing a gallonage tax

on the storage of gasoline was copied in South Carolina, and sustained in

Gregg Dyeing Company v. Query (S. C.)
164 S. E. 588, affirmed 286 U. S. 472.

A careful examination of the Florida Statute involved in the Sheip case, and a like examination of the South Carolina Statute *disclose no provision whatsoever for an increased ratio of storage fees dependent upon the number of places where storage was being made.* On the contrary, the fee chargeable was predicated upon the *amount* stored, regardless of the *number of places* where stored, either in the same county or in different counties.

We are wholly unable to see how counsel for appellees can sustain the contention of alleged "geographical uniformity" when the operation of the Act here involved upon Mr. Blume's business of 37 stores, all in Duval County, is compared with the operation of the Act upon the business of Winn & Lovett Grocery Company's 58 stores, situated in different counties of the State. As before noted, if the Winn & Lovett Grocery Company had 226 stores in different counties, it would be chargeable with an arbitrary state license tax, exclusive of the $3.00 per $1,000.00 on its stock, and exclusive of the municipal and county license tax, as required by Sec. 11 of the Act, of $42.76 per store on each of its stores operated in Duval County, as compared with $13.78 chargeable to Mr. Blume on each of his 37 stores operated in Duval County. If that be "geographical uniformity" we are unable to understand the meaning of the term.

It was also contended by counsel for the appellees that the State is not bound to tax all pursuits or businesses that might be legitimately taxed in order to sustain a particular license tax against one class of business, and such cases as

Southwestern Oil Co. v. State of Texas,
217 U. S. 114,

were cited to sustain that proposition. We readily concede the soundness of that proposition.
On the other hand it is equally well settled:

> "That the rights of all persons must rest upon the same rule under similar circumstances; . . . . . The classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike . . . . . Mere difference is not enough; the attempted classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

Louisville Gas & E. Co. v. Coleman,
277 U. S. 32, 37, 72 L. ed. 770, 774;
Frost v. Corporation Commission,
278 U. S. 515, 522, 73 L. ed. 483, 488.

No reasonable predicate can be found for the attempted sub-classifications created by sub-divisions (3), (5), (7), (9) and (11) of § 5 of the Florida Act. That attempted classification is a palpable attempt to prevent the invasion of new territory by persons already doing business in some other location, and to protect the so-called "independent" merchants from any added competition. Such attempted classification for such purposes, under the guise of a revenue measure, has been uniformly condemned.

Child Labor Tax Case, 258 U. S. 16, 37;
New State Ice Co. v. Liebmann, 52 S. Ct. 371,
76 L. ed. 747.

We, therefore, respectfully submit that the third and fifteenth assignments of error, R 172 and R 176, are severally well founded, and that the Florida Court erred in sustaining the validity of sub-sections (3), (5), (7), (9) and (11) of § 5 of the Act in question.

Before closing this branch of the discussion, it should also be noted that the journals of the Florida Legislature, in the First Extra Session of 1931, as noted in § IV. of the amended bill, R 7-8, show that the Legislature would never have adopted this Act without incorporating therein the arbitrary county line discriminations provided by sub-sections (3), (5), (7), (9) and (11) of § 5 of the Act. Such legislative journals are judicially noticed in Florida.

Amos v. Mosely, 74 Fla. 555, 77 So. 619.

The Bill as first passed by the House carried five

brackets similar to § 5 of the Indiana Statute (Jackson case, 38 Fed. (2) 654), but, as appears by the Senate Journal of June 23, 1931, page 2, those brackets of the House Bill were stricken out, and brackets 1 to 11, as now appear in § 5, were substituted, and the House afterwards concurred in that amendment. The Senate Journal of the regular session of May 30, 1931, shows that on that day Senate Bill No. 824 was introduced, but failed of passage because so near the end of the regular session. That Bill carried a section 5 almost word for word the same as section 5 of the Act passed at the First Extra Session. Hence it appears that the Senate was determined upon this County line discrimination, and, therefore, if the County line discrimination is void, then the whole Act must be declared a nullity, because the remainder would constitute a result not intended by the Legislature.

Williams v. Standard Oil Company,
278 U. S. 235, 73 L. ed. 287;
Smith v. Cahoon, 283 U. S. 553, 73 L. ed. 1264;
Grambling v. Maxwell, 52 Fed. (2) 256;
Ex Parte Smith, 100 Fla. 1, 128 So. 864.

Point 2.

CHAIN STORE WAREHOUSE DISCRIMINATION.—As Applied to the Factual Situation Presented by the Amended Bill and Petitions of Intervention, the Supreme Court of Florida erred in Sustaining the Discrimination created by Secs. 8, 5 and 2 of the Act, imposing a License Tax of $3.00 per $1,000.00 of Value on Goods carried in

Warehouses of some of the Appellants, while Wholesale Merchants, though affiliated as Parts of "Voluntary Chains," remain subject to the old Law, requiring the payment of only $1.50 per $1,000.00 of Value on their Stocks—Contrary to the Due Process Clause and Equal Protection of Laws Clause of the 14th Amendment.

This Point is raised by sec. VII. (d) of the amended bill, R 16, and is in substance the fifth assignment of error, R 173. The clause "at retail," contained in Sec. 8 of the Act, defining a "store", operates to exclude wholesale merchants altogether from the operation of the Act. Nevertheless the last clause of Sec. 5 of the Act, requiring the payment of $3.00 per $1,000.00 on the value of stock carried "for sale in such store," and the provisions of Sec. 2, requiring the applicant for a license to show what merchandise is

> "held in storage to be sold in or through such store,"

operate to impose that $3.00 per $1,000.00 on stock in warehouses of chain store companies who have warehouses in the State, whereas wholesale merchants like Lewis-Chitty Consolidated Grocery Company, who perform the wholesale function for the "voluntary chains" such as "Better Food Stores," remain subject to Sec. 926 Revised General Statutes of Florida (Sec. 1197 Compiled Genl. Laws), providing for the payment of only $1.50 per $1,000.00 on stocks carried by such wholesale merchants. Section 1197 Compiled

General Laws of Florida, (§ 926 R. G. S.) provides, less the provisos, as follows:

> "**Merchants, etc.; Proviso.**—Merchants, druggists and storekeepers shall pay a license tax as follows:
>
> For the first one thousand dollars or fraction of one thousand dollars of stock of merchandise, three dollars in each county and for each place of business, and one and one-half dollars for each additional thousand or fraction thereof; but dealers in merchandise *at wholesale only*, shall pay a license tax of *one and one-half dollars* for each one thousand dollars of their stock of merchandise." (Italics ours.)

The provisions of the Act under attack show plainly that they were deliberately designed to discriminate against any chain store operator, such as the Winn & Lovett Grocery Company, who now operates, or who might undertake to operate, locally in this State, both retail chain store units and distributing warehouses.

The Bill, R 28, also shows that the Lewis-Chitty Consolidated Grocery Company is the largest wholesale grocery concern operating in Florida. Its principal place of business is in Jacksonville, but it has other warehouses or branches in other Florida cities, such as Orlando, Tampa, Miami, Cocoa, and at other points. It is also shown that it now affiliates with the "Voluntary Chain" of so-called "independent" retail grocery merchants operating under the group name of "Better Food Stores," and that it makes de-

liveries from its several warehouses to the so-called "independent" units in substantially the same manner as Winn & Lovett Grocery Company delivers from its distributing warehouses in Jacksonville and Sanford, Florida, to its retail Units. And yet, under the Act wholesale merchants such as the wholesale merchant above mentioned, continue to pay, as provided by § 1197 Compiled General Laws of Florida, only $1.50 per $1,000.00 license tax on their stocks of merchandise.

It is shown by Exhibit 3 to the amended bill, R 70-71, that there are in the City of Jacksonville alone sixteen wholesale grocers, one of whom is the Lewis-Chitty Consolidated Grocery Company, above mentioned. Each of those sixteen wholesale grocers enjoys the same discrimination of $1.50 per $1,000.00 on stocks carried.

Section IX. of the amended bill explains that the Act creates the same kind of discriminations in favor of McKesson & Robbins, Inc., now owning and operating the wholesale drug warehouses heretofore owned by the Groover Stewart Drug Company, at the principal distributing points in Florida, i. e., Jacksonville, Orlando, Tampa and Miami. This is another wholesale chain, affiliated with retail merchants in the territories of the respective warehouses, and yet the statute deliberately creates a discrimination by exempting such wholesalers and leaving them subject to the old Statute of $1.50 per $1,000.00 on stocks carried.

It is further pointed out in §§ IX. and XI. of the amended bill, R 22 and R 27, that these wholesale concerns serve their affiliated retail units by motor truck deliveries, upon telephone requisitions from the retail units, over the

paved highways, constructed by the State of Florida, radiating from each distributing center, in the same manner as the Winn & Lovett Grocery Company distributes its merchandise from its warehouse in Jacksonville to its retail units in Jacksonville and surrounding territory. Such wholesalers as the Lewis-Chitty Consolidated Grocery Company, and the other fifteen doing business in the City of Jacksonville, supply retail units in the same manner as does the Winn & Lovett Grocery Company, not only with respect to making deliveries by truck, as aforesaid, but also in the matter of purchasing their goods at original sources of supply, and in the matter of having them assembled in local warehouses for the purpose of distribution.

The Lewis-Chitty Consolidated Grocery Company, speaking as a part of the "Better Food Stores" group, says in the "Extra" of July 2, 1932, page 3, column 3, Appendix B to this brief (under separate cover):

> "Warehouses are operated at Jacksonville, Orlando, Tampa and Miami, and they serve a wide trade area. The stragetic location of these warehouses enable the stores to receive shipments promptly and economically. This is one of the big features of the Better Food Stores in that stores are not forced to purchase large stocks which remain on the shelves for a year or more, but can order small stocks frequently, thus enabling them to offer fresh merchandise at all times . . . Now they can get the same low price on a small order as they can on a half carload."

Such wholesalers have virtually become partners with the retail operators affiliated in such groups.

The primary purpose of the warehouses of the Winn & Lovett Grocery Company, and the primary purpose of the warehouses of the sixteen wholesale grocers in the City of Jacksonville is in each case to facilitate retail food distribution. Each enjoys the same privileges and the same benefits, and the same protection from the laws of the State of Florida. We therefore submit that no sound basis exists for the discrimination imposed by the Act now under attack.

The Indiana Statute, Sec. 8 (Jackson case, 38 Fed. (2) 654) applied to all stores

> "in which goods, wares or merchandise of any kind are sold *either at retail or wholesale.*" (Italics ours.)

As previously noted, Sec. 8 of the Florida Act confines its operation to places where sales are made *at retail.* That provision and the last clause of Sec. 5 of the Act, and the requirements of Sec. 2 of the Act, cause this discrimination to clearly differentiate the case at bar from the Indiana case on this point. Again, no such discrimination was found in the North Carolina case, affirmed by this Court.

There is a Virginia Statute which does place an excise tax on the storage of goods in warehouses intended for distribution to retail units owned by the owner of the warehouse, and the Virginia Statute has been sustained by the State Court of Virginia, and also by this Court. If the Florida Statute in this respect was the same as the Virginia

Statute, then we would not complain of any wholesaler discrimination. In

Commonwealth v. Bibee Grocery Co. Inc. (Va.)
151 S. E. 293,

the Virginia Court sustained the Virginia Statute, placing a license tax on goods carried in storage in warehouses of chain stores. In that particular case a small grocery chain store concern, operating seven retail grocery stores in Lynchburg and vicinity, was the complainant, and objected to the license tax upon its warehouse, operated in connection with its small chain of grocery stores. In justifying the tax, the State Court said:

> "It is unquestionably true that the maintenance and operation of a large distributing house in addition to operating seven retail stores imposes upon the commonwealth and the cities thereof a greater burden in fulfilling their obligations of protecting property rights, maintaining streets and highways, as well as furnish sewer and other sanitary conveniences."

But it did not appear from this State Court decision how the tax imposed upon chain store warehouses compared with that imposed upon the warehouses of wholesale grocery companies serving independent retail operators. That feature of the Virginia Statute was, however, made perfectly clear by the 3-Judge decision in the case of

Great Atlantic & Pacific Tea Co. v. Morrissett,
58 Fed. (2) 991.

It appeared in that case that the Great Atlantic & Pacific Tea Company operated in the State of Virginia 226 retail grocery stores; that 190 of the Virginia stores were served by a distributing warehouse located in the City of Richmond; that about 45% of the goods sold by it in its Virginia retail stores did not pass through its Richmond distributing warehouse, etc. The particular point here in question, however, is the amount of the tax imposed upon the warehouse. The Court, text 992, said:

> "In addition to the tax on retail stores, the State of Virginia also levies a license tax on wholesale stores, *equal in amount to that levied on distributing warehouses.*" (Italics ours.)

Injunction was sought against the enforcement of the Virginia license tax on the distributing warehouse, pursuant to sec. 188 of the Virginia Tax Code. In the case at bar the last sentence of Sec. 5 of the Florida Act, together with other related sections, previously mentioned, imposes a state license tax upon distributing warehouses of chain stores of *double* that imposed upon the warehouses of wholesalers. Suppose that the Winn & Lovett Grocery Company currently carries $100,000.00 of goods in its Jacksonville, Florida warehouse? In that case, it is required to pay a state license tax, under Sec. 5 of the Florida Act on those goods of $3,000.00. Suppose the stock carried by the Lewis-Chitty Consolidated Grocery Company in Jack-

sonville is equal in amount, and that is a fair assumption, because it is specially alleged in the bill that it is the largest wholesale grocer in the State. In that case the wholesale company, serving retail units affiliated in the "Better Food Stores" group, would pay $1.50 per $1,000.00 on its $100,000.00 stock, or $1500.00, exactly one-half of that chargeable to the Winn & Lovett Grocery Company. On top of that, the Winn & Lovett Grocery Company must pay $42.76 per store on its retail units if it operates as many as 226, those in Duval County and elsewhere, as compared with $5.00 per unit paid by independent retailers; and on top of both forms of state license tax, it must pay additional county license and municipal license fees, graduated as provided in Sec. 11 of the Act, yet to be considered.

The 3-Judge Court in the Morrissett case justified the Virginia Tax of *equal amount* by the following observations found in the opinion:

> "The respondents contend that a distributing house that distributes to 'stores' is in the same class as a wholesale house, and performs the same function; that a distributing warehouse requires the same use of the streets, the same fire and police, and other public service protection, and occupies the same general relation to the taxing power as a wholesale house. The respondents further contend that a retail store, owned and operated singly, when it sells its goods to the public sells them burdened with both the wholesale and retail tax, and that, where a number of stores are

> operated together, as here by the complainant, which virtually does its own wholesaling through its distributing house is properly classified and properly taxed as a wholesale house or warehouse. It is conceded that the tax imposed by the statute in question here is *equal* to the tax on a wholesale house . . . In the present case, in the light of these decisions of the Supreme Court, we are of the opinion that the classification made by the statute is a reasonable and not an arbitrary one. Certainly 'all persons similarly circumstanced' are treated alike . . . Every distributing house performs the function of a wholesale house, and to classify a distributing house with a wholesale house for the purpose of taxation certainly is reasonable and not arbitrary."

Such, then, is the decision which was affirmed by this Court, 284 U. S. 584, 585, 76 L. ed. 506.

If the Virginia Tax on distributing warehouses of chain stores located in that State had been *double* the excise or license tax imposed upon a regular wholesale house, then the tax could not possibly have been justified by the reasoning applied by the 3-Judge Court, or that applied by the State Court in the Bibee Grocery Company case, supra. The sole ground for upholding the tax was, in short, that the tax upon distributing warehouses was an "equalizer" of tax burdens, in order to make the tax upon retail distribution through chain stores equal to the combined bur-

den imposed upon regular wholesalers and that imposed upon their retail single unit customers.

The gasoline gallonage tax imposed upon the storage of gasoline by the Florida Statute, involved in Sheip v. Amos, 130 So. 699, supra, and imposed by the South Carolina Statute, involved in Gregg Dyeing Co. v. Query, 286 U. S. 472, was sustained on precisely the same ground, i. e. as an equalizing excise tax. But suppose that the gallonage tax on gasoline for the privilege of storing it for the purchaser's use had been *double* that imposed on gasoline ordinarily purchased through filling stations by other classes of users? Obviously such double imposition would have been an unsustainable discrimination.

It does not seem necessary to again review analogous cases for legal formulas that should apply to this form of discrimination. Sufficient formulas in that behalf may be drawn from the following decisions of this Court:

Louisville Gas and E. Co. v. Coleman,
277 U. S. 32;
Airway Elec. Corp. v. Day, 266 U. S. 71;
Smith v. Cahoon, 283 U. S. 553;
Southern R. Co. v. Greene, 216 U. S. 400, 417;
Cotting v. Kansas City Stock Yards Co.
183 U. S. 79;
Frost v. Corporation Commission, 278 U. S. 515.

In the Cotting case, 183 U. S. text 104, 105, this Court, among other things, said:

"The question thus presented is of the profound-

> est significance. Is it true in this country that one who by his attention to business, by his efforts to satisfy customers, by his sagacity in discerning the probable courses of trade, and by contributing of his means to bring trade into those lines, succeeds in building up a large and profitable business, becomes thereby a legitimate object of the legislative scalping knife? Having created the facilities which the many enjoy, can the many turn around and say, you are making too much out of those facilities, and you must divide with us your profits? . . . The possibility of such legislation suggests the warning words of Judge Catron, afterwards Mr. Justice Catron of this Court, when in Vanzant v. Waddel, 2 Yerger, 260, 270, he said:
>
> 'Every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community, who made the law, by another.' "

When the Florida Legislature deliberately imposed upon chain store warehouses *double* the excise tax which was to be paid by ordinary wholesalers upon goods carried in their warehouses, it becomes again perfectly apparent

that the "legislative scalping knife" was being applied to chain store retail distribution.

The amended bill, R 34, specifically alleged that the Legislature knew that "voluntary chains" were then operating in the State, such as "Independent Grocers Alliance" and "McKesson-Robbins, Inc." etc., and nevertheless deliberately created this discrimination against chain store warehouses, leaving the warehouses of wholesalers serving "voluntary chains" subject to the $1.50 per $1,000.00 under the old law. Such arbitrary and deliberate discrimination is not fair play, is not due process of law, and is not equal protection of the laws. In

Gregg Dyeing Company v. Query, 286 U. S. 472, 476, 480, 76 L. ed. 1232, 1236, 1238,

this Court adhered to the rule that a complementary excise tax, such as the gallonage tax on gasoline kept in storage, there involved, must be considered in connection with other tax burdens imposed by cognate statutes in order to test the question of substantial discrimination. The North Carolina Court did the same thing in the case of

Great Atlantic & Pacific Tea Co. v. Maxwell, 154 S. E. 838, affirmed 284 U. S. 575, 76 L. ed. 500.

To apply that rule in the case at bar, there is still no basis for doubling the excise tax on chain store distributing warehouses.

Section 1, Art. IX. of the Florida Constitution provides for a uniform and equal rate of ad valorem taxes on both

real and personal property. Sec. 5, Art. IX. of the Florida Constitution provides for authorizing counties and municipalities "to assess and impose" ad valorem taxes "upon the principles established for State taxation." In pursuance of those provisions of our Constitution, § 893 Compiled General Laws of Florida, 1927 (§ 695 R. G. S.) provides as follows:

> "893 (695) **Subjects of Taxation.**—All real and personal property in this State, and all personal property belonging to persons residing in this State, not hereby expressly exempted therefrom, shall be subject to taxation in the manner provided by law. (Ch. 4322, Acts 1895, § 1; Ch. 5596, Acts 1907, § 1)."

Section 896 Compiled General Laws of Florida, 1927, (§ 696 R. G. S.) provides in part as follows:

> "896 (696) **Personal Property Defined.**—The terms 'personal property' and 'personal estate' as used in this chapter, shall have the same meaning and shall, for the purpose of taxation, be construed to include all goods and chattels, moneys and effects, all boats and vessels, all debts due or to become due from solvent debtors, whether on account, contract, note, or otherwise, all public stocks or shares in all incorporated or unincorporated companies."

Other sections of the Florida Statute provide the necessary machinery for assessing, levying and collecting

ad valorem taxes on all real and personal property for State, county and municipal purposes. It follows that all the goods, chattels, moneys, debts due, notes held, or other personal property, tangible and intangible, owned by appellants severally within the State of Florida, are subject to ad valorem state, county and municipal taxes. It is impossible, therefore, to sustain the $3.00 per $1,000 chain store warehouse tax as an "equalizer" of tax burdens.

It is true that some of the appellants maintain no warehouses in Florida, but do maintain warehouses in other States. Other appellants maintain no warehouse at any place. Nevertheless, this is a several appeal, and hence those injured by the warehouse tax, severally, have the right to complain. The Liggett Company has a central warehouse in New York City, R 20, but none in Florida. Obviously, it is not subject to the excise tax of $3.00 per $1,000.00 on goods carried in that warehouse. The State of New York can, and presumably does, levy adequate taxes for the protection it affords to that warehouse.

The same situation is true of the appellant Montgomery Ward & Company, with its headquarters and warehouse in Chicago, R 92.

Other appellants besides Winn & Lovett Grocery Company do operate warehouses in Florida. The appellants Southern Stores Corporation and South Florida Stores Corporation maintain warehouses in Miami, West Palm Beach and Tampa, R 98-99. Paxson's Inc. operating 8 small shoe stores, seven in Florida and one in Georgia, operates no warehouse anywhere, but gets its stock direct from the factories operated in other States, just as do its single store and chain store competitors, R 35 to 37. The appellants

Melville Shoe Corporation and G. R. Kinney Company are two of its chain store competitors. They both operate as Paxson's Inc. operates—without any warehouse, R 90-91.

It is thus seen that the appellants who conduct grocery chain store units in Florida are the ones entitled to complain of this warehouse discrimination. As to them, the discrimination, it seems to us, is indefensible.

Point 3.

COUNTY AND MUNICIPAL LICENSE DISCRIMINATIONS. — As Applied to the Factual Situation Presented, the Supreme Court of Florida erred in sustaining the Validity of Section 11 of said Act, imposing Cumulative, Discriminatory County License Taxes, and Authorizing Discriminatory Municipal License Taxes—Contrary to the Due Process Clause and Equal Protection of the Laws Clause of the 14th Amendment.

This Point is raised by § VII. (c) of the amended bill, R 16, and is in substance the fourth assignment of error, R 173.

We have grouped the objection as to the county license tax and the municipal license tax under one Point because the method of arriving at each under the provisions of § 11 of the Act is the same, so that the county license tax and the municipal license tax will stand or fall together. Nevertheless, for the sake of clarity, we shall discuss them separately.

(1) *County License Discrimination.*

As to County Licenses, section 11 of the Act provides, among other things, as follows:

> "A county license tax of twenty-five per cent of the State license tax shall be levied and imposed upon each store as here defined . . . provided that the tax levied by or for the several counties . . . shall be graduated only on the number of stores situate in such county . . . respectively, notwithstanding the applicant may own other stores beyond the limits of such County."

The phrase "State license tax," embodied in this section, has the effect of including as a part of the County license tax 25% of the arbitrary bracket license fees provided for by sub-sections (1), (2), (4), (6), (8) and (10) of section 5 of the Act, as applied to all stores in a particular county, plus 25% of the $3.00 per $1,000.00 on stocks carried in retail units, and warehouse, if there be any, in the same particular county.

The operation and effect of § 11 as to County licenses may be illustrated by the business of the appellant, Winn & Lovett Grocery Company. It appears by § III. of the amended bill, R 4, that Winn & Lovett Grocery Company owns and operates 23 of its retail units in Duval County. Hence to arrive at 25% of the bracket license fees prescribed by sub-sections (1), (2), and (4) of § 5 of the Act, we get the following table:

TABLE 5—(County License)

1 Store		$ 5.00
14 Stores at $10.00		140.00
8 Stores at $15.00		120.00
23 Stores, total		$265.00
25%	$66.25	

To this we must add 25% of the license tax on stocks carried in the retail units and Jacksonville warehouse of this appellant. The value of those stocks is not alleged in the amended bill, but we may safely assume that each retail store carries an average stock of the value of $2,000.00; and we may assume that its principal Jacksonville warehouse, serving the majority of the Company's fifty-eight retail units, carries an average stock of the value of $75,000.00—making a combined value for the warehouse stock and 23 retail store stocks of $121,000.00. This at $3.00 per $1,000.00 gives the sum of $363.00, 25% of which is $90.75. That amount added to $66.25, above shown, gives a total County license tax for Duval County upon the business of Winn & Lovett Grocery Company of $157.00. Of this amount $56.25 results from the 25% of the $3.00 per $1,000.00 on the stock carried in the warehouse.

It is thus seen that the County license tax provided for in § 11 of the Act, is constructed on the same plan as the two State license taxes, and that the discrimination created thereby is cumulative—the greater the number of stores the greater the discrimination.

The same authorities which condemn the State license tax on chain store distributing warehouses, discussed under

Point 2 supra, likewise condemn the County license tax, because the 25% County license tax is precisely the same kind of discrimination. At least that is true as to the appellant Winn & Lovett Grocery Company with respect to its business in Duval County.

The State bracket license fees prescribed by sub-sections (1), (2), (4), (6), (8) and (10) of § 5 of the Act, stand upon somewhat different footing from the different County license fees discussed under Point 1, supra, but we shall present a full discussion of such single County graduated State and County license fees under Point 7 of the argument, later to be taken up.

(2) *Authorized Municipal License Tax.*

Section 11 of the Act, in prescribing a municipal license tax, does so in precisely the same terms as regards the County license tax, except that as to the latter the Act is mandatory, and as to the former, permissive. The language is

> "Each incorporated municipality of the State of Florida is *authorized* to levy a municipal tax of twenty-five per cent of the State tax imposed by this Act."

Other provisions of the section require that in measuring such authorized municipal license tax by the standards fixed for State license taxes, only the stores in each particular municipality,—and that would include a distributing warehouse, if there was one,—must be taken into account.

The statutes of the State of Florida, sections 2935 to 3141, Compiled General Laws, 1927 (§§ 1825 to 1985 R. G. S. 1929), provide a general law for the organization and government of cities and towns. Any city or town of the State operating under such general law would be authorized to apply the 25% license taxes prescribed by § 11 of the Act under attack. But it so happens that very few cities and towns of the State of Florida, especially of the larger ones, operate under the general law. Nearly all of the important cities and towns of the State operate under special legislative charters, granted pursuant to § 8, art. VIII. of the Florida Constitution, which provides:

> "The Legislature shall have the power to establish and to abolish municipalities, to provide for their government, to prescribe their jurisdiction and powers, and to alter and amend the same at any time."

Under that Constitutional provision it is usual for the charters of cities and towns of the State, operating under special charters, to carry provisions with respect to license taxes, similar to the following:

> "To license privileges, business, occupations and professions carried on or engaged in within the city limits, and the amounts of such licenses and the amount of such license taxes shall be fixed by city ordinance, which amounts of said taxes shall not be dependent upon a general state revenue law."

Such a provision is embodied in the charter of the City of Miami, as shown by the case of

State v. Dillon, 75 Fla. 785, 79 So. 29.

Section 5, Art. IX. of the Florida Constitution authorizes the Legislature to delegate to municipalities the power to levy ad valorem taxes and taxes upon licenses and privileges; and the Supreme Court of Florida has held that a Municipality, in exercising the power so delegated, must be guided by the principles applicable to State taxation.

Ellis v. ACL R. Co. 68 Fla. 160, 66 So. 1005.

To apply the latitude thus given by the Florida Constitutional provisions applicable to municipalities, and the powers given by special charters, every municipality operating under such special charter may adopt the "principle" of a graduated license tax upon retail merchants, such as defined by § 5 of this Act, but can, by Ordinance, fix the *amounts* very much greater. And, therefore, if the Florida Supreme Court's decision remains unchanged every municipality in the State operating under a special charter may fix a schedule of licenses chargeable to multiple store operators, starting with, say $10.00 for a single store, and double the amount for each additional store, and we would then have the following result, say up to ten stores:

TABLE 6—(Authorized Municipal License)

1st Store	$ 10.00
2nd Store	20.00
3rd Store	40.00
4th Store	80.00
5th Store	160.00
6th Store	320.00
7th Store	640.00
8th Store	1280.00
9th Store	2560.00
10th Store	5120.00
10 Stores, total	$10230.00
Average per Store	$1023.00

Such action by Florida Municipalities is not mere speculation. On the 28th day of September, 1932, the City of West Palm Beach adopted a general occupational license tax Ordinance, containing the following provision as to merchants:

"Merchants, retail, (provided license shall permit but one location) when the average value of stocks of goods carried are as follows:

Not exceeding $1,000.00	$10.00
More than $1,000. for each additional $1,000. or fraction thereof	1.50

Where more than one store is owned or operated in said City, by the same person, company, corporation or partnership, there shall

> be charged in addition to the foregoing sum $25.00 for the second such store, $50.00 for the third such store and $50.00 each for all stores in excess of three."

This is, therefore, a concrete example of what such Cities of the State of Florida may do where operating under special charters. A certified copy of the material portions of the West Palm Beach Ordinance is shown by Appendix C to this brief.

We are informed that the Cities of Maplewood, Missouri, and Hamtramck, Michigan, have adopted licenses of $1,000.00 for every multiple store, and the City of St. Louis imposes licenses up to $250.00 for each multiple store in excess of twenty-five, and that suits are now pending in those jurisdictions to test the validity of ordinances prescribing said license taxes.

With such authority vested in the hands of all Florida municipalities, the following observations from

Cooley on Taxation, 4th ed. Vol. 1, § 259,
become quite pertinent:

> "If the principle of selection be once admitted, limits cannot be set to it, and it may be made use of for the purposes of oppression, or even of punishment. It might also be made use of to give special privileges in the nature of monopolies."

Again, this Court's reasoning in the case of

Cotting v. Kansas City Stock Yards Co. 183 U. S.

text 112, applies, i. e.:

> "If once the door is opened to the affirmance of the proposition that a State may regulate one who does much business, while not regulating another who does the same but less business, then all significance in the guarantee of the equal protection of the laws is lost, and the door is opened to that inequality of legislation which Mr. Justice Catron referred to in the quotation above made."

No municipality was made a defendant in this case because none had acted adversely at the time this suit was filed, but if the decision of the Supreme Court of Florida is sustained it will be an easy matter for municipalities of the State, acting under such Ordinances as that of West Palm Beach, to add such burdens to the arbitrary State license taxes as will completely destroy all chain store distribution within the State. Such authorized and potential municipal license taxes as above suggested, would easily exterminate the business of Winn & Lovett Grocery Company, operating 23 retail stores in the City of Jacksonville; and also exterminate the "Whiddon Stores," operating 37 retail stores in the City of Jacksonville.

No such cumulative discriminations for county license taxes and municipal license taxes, pyramided on a double

form of State license tax, were involved in the Indiana chain store case, or any other chain store case reviewed by this Court.

As said by Mr. Chief Justice TAFT in the Child Labor Tax Case: The

> "prohibitory and regulatory effect and purpose (of the Florida Act) are palpable."

The provisions of section 11 and the provisions of section 5 of the Act under attack, are

> "clear and hostile discriminations"

against all chain store retail distribution.

The framers of the Florida Act were not content to adopt the single scheme of a graduated license tax upon chain stores, as defined by the five brackets of section 5 of the Indiana Statute, but, as we have seen, they added to and multiplied the discriminations—different County Discrimination, the warehouse discrimination, County License discrimination, and Municipal License Discrimination. It thus becomes very plain that the Florida Legislature did not intend to permit the survival of chain store retail distribution in this State.

In the case of

> People v. Gillson, 109 N. Y. 399, 17 N. E. 343 (1888)

Judge PECKHAM, afterwards a Justice of this Court, aptly

described the obvious purpose and effect of the Florida Act, in the following language:

> "It is evidently of that kind which has been so frequent of late, a kind which is meant to protect some class in the community, against the fair, free and full competition of some other class; the members of the former class thinking it impossible to hold their own against such competition and therefore flying to the Legislature to secure some enactment which will operate favorably to them, or unfavorably to their competitors."

The same doctrine was reaffirmed and again applied by the New York Court in the case of

People v. Jenkins (N. Y.) 94 N. E. 1065.

In the case of

Liggett Company v. Baldridge, 278 U. S. 105, 113,

this Court said:

> "A state cannot, under the guise of protecting the public, arbitrarily interfere with private business, or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them."

Point 4.

ARBITRARY ADMINISTRATION OF THE ACT.—The Supreme Court of Florida erred in Sustaining the Comptroller's Arbitrary and Discriminatory Administration of the Act, whereby he undertook to Exempt Furniture Dealers, Filling Stations that sell Tires and Tubes, Automobile Dealers, Cigar Stores, Restaurants, and other Classes of Store Operators, regardless of whether Single Store Operators or Chain Store Operators —Contrary to the Due Process Clause and Equal Protection of the Laws Clause of the 14th Amendment.

This is a re-statement of the eighth assignment of error, R 174.

The record, page 1, shows that the original bill was filed September 30, 1931. After that date and prior to the filing of the amended bill on November 12, 1931, appellants learned that the appellee Comptroller, in the administration of the Act, was undertaking to create many exemptions not provided for by the Act itself. The amended bill, sections XV and XVI, R 49 and R 53, show that the appellee Comptroller has undertaken to exempt furniture dealers, filling stations that sell tires and tubes, automobile dealers, cigar stores, restaurants and sundry other classes of store operators, regardless of whether single store operators or chain store operators, and that in doing so he has created additional arbitrary and unreasonable discriminations against appellants severally.

The same matter was again sharply brought to the

attention of the Supreme Court of Florida by section 10 of the petition for rehearing, R 157 to 158. Appellants there pointed out what we believe are erroneous conclusions stated in the concurring opinion of Mr. Justice Davis, R 121-122, also 141 Sou. 160, bottom of second column and 161, first column.

As to furniture dealers, the affidavit of G. D. Wood, R 78 to 79, shows that his furniture company, Independent Furniture Company, with a small capital stock of less than $25,000.00 understood that a chain furniture dealer such as his company would be subject to the terms of the Chain Store Act. Accordingly his company prepared a petition of intervention for filing in this suit and draft thereof was attached to his affidavit and appears R 79. Afterwards the said Wood was informed that the Comptroller under the advice of the Attorney General had construed the Act not to apply to furniture dealers, notwithstanding the express definition of the term "store" found in Sec. 8 of the Act and also in Sections 1 and 2 of the Act, and that the Comptroller had ruled that Section 893 Revised General Statutes of Florida (Section 1149 Compiled General Laws, 1927) would apply to furniture dealers instead of the Chain Store Act, regardless of whether such furniture dealers operated chains of stores or otherwise. The ruling of the Comptroller in that behalf is shown by a letter embodied in section XV of the amended bill, R 50, dated October 27, 1931, addressed to all Tax Collectors of the State. In that letter he first announces that the Act here under attack repeals Section 1197 of the existing license tax laws only as to retail stores and left in force the provisions thereof applicable to wholesale stores as previously dis-

cussed. The second paragraph of the letter relative to Section 1149 of the prior law is confusing because the word "necessary" is used, whereas the context plainly indicates that the Comptroller intended to use and doubtless did use the word "unnecessary" and that the mistake occurred in making copy. This is made clear by the affidavit of G. D. Wood, R 78, showing that after the preparation of his petition of intervention, the Tax Collector of Duval County accepted the payment of license fees on the basis of the old License Act. Section 1149 Compiled General Laws relating to furniture dealers provides in part:

> "Dealers in Furniture . . . . With capital stock less than $25,000.00 shall pay a license tax of $10.00."

and so $10.00 is what the Independent Furniture Company, represented by G. D. Wood, paid, pursuant to the old law as ruled by the Comptroller in his letter of instructions to the several tax collectors of the state.

As to dealers in cigars and tobacco, Section 1120 Compiled General Laws (864 RGS) provides as follows:

> "Cigars and Tobacco—Dealers in cigars and tobacco, who pay no other license, shall pay a license of $5.00."

Upon the same theory as alleged in the amended bill the Comptroller is exempting dealers in cigars and tobacco from the operation of the Chain Store Act, regardless of whether such dealers operate single stores or many stores in the

same county or in different counties.

It so happens that one of the appellants, United Cigar Stores Company, deals in cigars and tobaccos, through a chain of stores operated in Florida and other states, but in such stores they sell other things besides cigars and tobaccos, namely, pipes and other accessories ordinarily purchased by users of tobacco; soft drinks, chewing gum, toilet articles and many other items. On this account, appellant, United Cigar Stores Company, gets no protection from the administration of the Act now being applied by the Comptroller; on the contrary its competitors dealing only in cigars and tobaccos are being exempted by the Comptroller under Section 1120 Compiled General Laws in the manner aforesaid.

The appellant, Liggett Company, also sells cigars and tobaccos, cigarettes, etc., in each of its twenty-two retail drug stores operated in different counties of Florida. Nevertheless it is being subjected to pyramided license taxes provided for in sections 5 and 11 of the Chain Store Act, while its competitors, selling cigars and tobaccos only, are not subjected to any such scheme of tax burdens.

So again, Section 1168 Compiled General Laws, 1927 provides:

> "1168 (897.) *Green groceries, fruits.* Green grocers and dealers in fresh fruits and nuts, paying no other licenses, shall pay a license tax of three dollars."

The Comptroller's administration of the Chain Store Act now complained of in sections XV and XVI of the amended bill means that he in like manner is exempting dealers in green groceries and dealers in fresh fruits and nuts, regardless of whether such dealers operate one place of business or a chain of such places of business, either in a single county or in different counties. Four of the appellants operate retail grocery stores in different counties of the State of Florida. A large part of the stock carried in each such retail grocery store by each such appellant consists of green groceries and fresh fruits and nuts. Yet, their competitors dealing only in green groceries and fruits and nuts are not being subjected to the several forms of discriminatory license taxes provided for by sections 5 and 11 of the Chain Store Act.

Again, Section 1236 Compiled General Laws, 1927, as to cafes and restaurants, provides as follows:

> "1236 (964.) *Restaurants, cafes, etc.*—Owners or managers of restaurants, cafes and public eating saloons shall pay a license tax as follows:
> With seats or accommodations for fifteen or more persons, shall pay a license tax of ten dollars.
> With seats or accommodations for less than fifteen persons, shall pay a license tax of five dollars."

The definition of "store" contained in Sec. 8 of the Act of 1931 very clearly embraces such places of business, because restaurants sell not only food that is cooked and

served but they sell fresh fruit and ordinarily cigars, tobaccos, chewing gum and the like. It cannot be denied that they sell "goods, wares or merchandise", and yet the Comptroller is exempting restaurants and cafe dealers from the arbitrary license fees provided for by the Act of 1931 holding that the section of the old statute last above quoted remains applicable, and no other, regardless of whether the restaurant operator owns one restaurant or a chain of restaurants. The amended bill particularly mentions the fact that in the City of Jacksonville there are several chains of "Pig Stands." The amended bill shows, and for that matter it is common knowledge that drug stores serve sandwiches, milk, ice cream and lunches so that the business of restaurants and cafes come in direct competition with the business of drug stores such as those operated by the Liggett Company in Florida, and yet this bracketed scheme of license taxes, by the administration of the Comptroller, is not being applied to restaurant chains, cafe chains or pig stand chains.

Again Sec. XV. of the amended bill, R 51, shows that section 1061 Compiled General Laws, provides a graduated tax for tire and tube dealers depending upon the population of the towns or cities where such dealers do business, and that the Comptroller, acting on the advice of the Attorney General, has assumed to exempt tire and tube dealers though no such exemption is found in the Chain Store Act under attack. It is on the same page shown that the Standard Oil Company operates a chain of several hundred filling stations in the State of Florida and sells through them not only gasoline and other petroleum products, but also automobile tires and tubes, and it is then

alleged that because that company sells tires and tubes in connection with gasoline and other petroleum products, the Comptroller on account of Section 1061 Compiled General Laws has undertaken to exempt the Standard Oil Company from the operation of the Chain Store License Act.

The daily journals of the Florida House of Representatives at the first extra session of 1931 show that when the Committee Substitute for House Bill No. 8-X was pending in the House, as appears by the house journal of June 19, 1931, pages 26-27, Representative Lewis of Gulf County offered the following amendment to be added at the end of section 8 of the Bill.

> "Provided, however, the term 'store' shall not apply to or be construed to mean or include any store *primarily* operated for the sale of gasoline or other petroleum products."

This was alleged in the amended bill, bottom R. 51. In lieu of that proposed amendment a substitute amendment was offered creating the proviso which is now found at the end of Sec. 8 of the Act, and the amendment, so adopted specifically confines the exemption to filling stations engaged *exclusively* in the sale of gasoline and other petroleum products.

It therefore appears that the Comptroller in his administration of the Act is attempting to do what was provided for by the Lewis amendment, rejected by the Legislature.

It is contended by the appellants severally that the Comptroller's administration of the Chain Store Act in the

several particulars mentioned is wholly unjustified. No such exemptions were contained in the Act itself and if they had been, such exemptions would furnish additional reasons for the invalidity of the Act.

If the ascending bracket scheme of Section 5 of the Act is just and reasonable, first for single counties and second for different counties, when applied to chain store owners operating *grocery* stores or operating *drug* stores or operating *shoe* stores, then why should these classes of merchants be singled out and many other merchants doing business in the same way be exempted by the State Comptroller charged with the administration of the Act?

Such discriminatory administration of a state law by a state official, particularly by an administrative officer such as the State Comptroller in this case, has been uniformly condemned by the decisions of this Court.

Yick Wo. v. Hopkins, 118 U. S. 356;
C. B. & Q. R. Co. v. Chicago, 166 U. S. 226, 234;
Home Telephone & Tel. Co. v. Los Angeles, 227 U. S. 278, 57 L. Ed. 510;
Harkness v. Irion, 278 U. S. 92, 73 L. Ed. 198;
Iowa-Des Moines Natl. Bank v. Bennett, 284 U. S. 239, 76 L. Ed. 265.

In the Bennett case, the Court, speaking through Mr. Justice BRANDEIS, 284 U. S. text 247, said:

> "The right invoked is that to equal treatment; that such treatment will be attained if either their competitors' taxes are increased or their own

reduced. But it is well settled that a tax-payer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid. Cumberland Coal Co. v. Board of Revision, supra; Greene v. Louisville & Interurban R. Co., 244 U. S. 499, 514-518; Chicago Great Western Ry. Co. v. Kendall, 266 U. S. 94, 98; Sioux City Bridge Co. v. Dakota County, supra. Nor may he be remitted to the necessity of awaiting such action by the state officials upon their own initiative. Montana Natl. Bank v. Yellowstone County, supra."

Point 5.

ACT VOID IN ITS ENTIRETY.—AS Applied to the Factual Situation Presented by the Amended Bill and Petitions of Intervention, the Supreme Court of Florida erred in sustaining Chapter 15624 in its Entirety.

This is a re-statement of the 1st, 10th, 11th and 12th assignments of error, R 172 and R 175. The amended bill in this case attacks sundry provisions of Sections 5 and 11 of the Act separately and then attacks the Act as a whole. The County line discriminations discussed under Point 1, supra, the chain store warehouse discrimination discussed under Point 2, supra, and the County license and

Municipal license discriminations discussed under Point 3 supra, are sufficient of themselves to destroy sections 5 and 11 of the Act. Those two sections are the operative parts of the Act and if they are eliminated the remainder will constitute a result never intended by the Legislature. Indeed no such Act, as would be constituted by the remainder, would ever have been enacted, and hence the invalidity of section 5 alone would destroy the Act in its entirety.

Williams v. Standard Oil Company, 278 U. S. 235;
Frost v. Corporation Commission, 278 U. S. 515, 9 h. n.;
Smith v. Cahoon, 283 U. S. 553;
Grambling v. Maxwell, 52 Fed. (2) 256;
Ex Parte Smith, 100 Fla. 1, 128 So. 864.

The objections heretofore discussed under Points 1, 2 and 3 have been predicated upon the due process clause and the equal protection of the laws clause of the 14th Amendment. We propose next under Point 6 to point out the invalidity of the Act because in derogation of the commerce clause, Sec. 8, Art. I of the Federal Constitution, and the equal privileges and immunities clause of Sec. 2, Art. IV of the Constitution. If Point 6 is sustainable the same constitutes an additional reason why the Act under attack is void in its entirety.

Point 6.

COMMERCE CLAUSE AND EQUAL PRIVILEGES CLAUSE VIOLATED.—As applied to the Factual Situation Presented, the Supreme Court of Florida erred in sustaining the Validity of said Act as against the Objections that the same Operates to burden Interstate Commerce conducted by Appellants Severally, and operates to deprive Appellants Severally of the same Privileges and Immunities enjoyed by Citizens of the State of Florida—Contrary to the Commerce Clause, § 8, Art. I., and contrary to the Equal Privileges and Immunities Clause, § 2, Art. IV. of the Federal Constitution.

This is substantially the seventh assignment of error, R 174. This proposition embraces two questions: (1) burden upon interstate commerce conducted by appellants severally, contrary to the Commerce Clause, § 8, Art. 1. of the Federal Constitution; and (2) a deprivation of equal privileges and immunities of citizens of the several States, contrary to § 2, Art. IV. of the Constitution. These two questions are urged in sundry paragraphs of the amended bill and petitions of intervention. For example, § VIII. of the amended bill, R 19, and § XVII. of the amended bill, R 54. In § XVII. of the amended bill, beginning R 54, it is pointed out that the appellant Louis K. Liggett Company supplies its retail store units in Florida and in other States upon requisitions received from its several store managers, for periodical shipments, either weekly or twice a month, from its central warehouse in New York City, or from fac-

tories with which prior contracts have been made by it, in contemplation of such periodical shipments.

> "That the making of contracts with the factories for such supplies and shipments, the transmission of orders from store managers and the making and transportation of orders from the store managers and the making and transportation of such regular periodical shipments, all and singular, constitute interstate commerce. That in order to keep fresh drugs and medicines on hand in such retail store units and prevent accumulation of old stock it is necessary to make frequent shipments as aforesaid from fresh sources of supply. That frequent shipments as aforesaid aid your complainant in securing a rapid turn over in said retail units."

It is next pointed out that appellant, Winn & Lovett Grocery Company, and appellant, Paxson's Inc., conduct their several businesses in substantially the same manner, except that Winn & Lovett Grocery Company has local warehouses in Florida, for purposes of local distribution, and that Paxson's Inc. has no warehouse, but causes periodical shipments to be made direct from factories. It is next alleged, R. 55:

> "That the Legislature, being so informed, designedly undertook by the oppressive, arbitrary and excessive license fees called for by said

> Act to burden the interstate characteristics of your orators' several businesses as aforesaid. That the Commerce Clause of the Federal Constitution entitled your orators to carry on the interstate features of their several businesses without hindrance and without such burdens as are attempted to be imposed by said Act."

The petition of intervention by the Nunnally Company, another appellant, R 85, among other things, alleges:

> "That in order to keep its stocks of candies, etc., carried in its said Florida retail stores fresh and attractive to the retail trade petitioner makes frequent interstate shipments to said stores from its Georgia factory upon periodical interstate requisitions therefor, sent by mail, wire or telephone, from petitioner's managers of said Florida stores."

The averments of the amended bill, and of these several petitions of intervention, were likewise admitted by the motion to dismiss.

As supporting data, we call the Court's attention to one of the reports made by the Federal Trade Commission to the United States Senate, pursuant to the Brookhart Resolution, No. 224, of the 70th Congress, now known as

Senate Document No. 30, 72nd Congress, First Session. The title of that report is:

"Sources of Chain Store Merchandise."

Such official sources of information are judicially noticed by this Court.

Atchison, Topeka, Etc. R. Co. v. U. S. 284 U. S. 248, 260, 76 L. ed. 273, 280, footnotes 7 and 8;

Standard Oil Company v. U. S. 283 U. S. 163, 171, 172, 176, 177 and 178—foot notes 5, 6, 10, 11, 14, 16 and 17.

The first paragraph of the letter of submittal also says:

"There are essential differences among chains in various lines of business, as well as within the same line, in the extent to which they undertake to buy goods direct from manufacturers and perform the wholesaling operations for themselves."

A further part of the letter of submittal says:

"Chains in different lines of business show marked differences in sources patronized."

Sundry sources of supply are then mentioned.

The letter next points out differences in purchasing practices of different chains, and, finally, sources of supply of specified commodities.

The first section of the report itself, page 1, among other things, says:

> "Because chain-store systems undertake to a greater or less degree to purchase goods direct from manufacturers and other producers and to perform for themselves the *wholesale assembling and distributing operations which are essential to their functioning as retailers,* it was deemed essential to inquire into the extent to which they purchase their goods from these direct sources as compared with the extent of their purchasing through wholesalers and other types of middlemen. . . . . In so far as they purchase directly from manufacturers, they must undertake *to perform for themselves and bear the cost of the wholesale assembling and distributing of the goods.* (Italics ours)

It is thus found by the Federal Trade Commission that the wholesale assembling and distributing operations of chain stores, such as the appellants

> "are essential to their functioning as retailers."

In short, they could not operate their retail units in the State of Florida as parts of their chain store enterprises, if their "wholesale assembling and distributing operations" in interstate commerce were eliminated.

It is thus made to appear that the operation of a national chain-store enterprise must be regarded as a national unit, of which the retail stores in any particular State, such as Florida, constitute only a part. A mere selling of groceries, drugs, shoes, wearing apparel, or other merchandise, across the counter in a retail store, as an intrastate transaction, is only one of the steps which a chain-store merchant necessarily takes in the process of distribution from the producer to the consumer. He must first buy, or make contracts to buy, the commodities at points of production. He must next arrange for their transportation; next procure their assembling at a convenient point of distribution; next receive requisitions sent in interstate commerce for periodical shipments to the retail units in Florida and elsewhere; next, shipments must be sent in pursuance of such requisitions; next reports must be maintained through interstate commerce in order for the head office to keep in touch with turn-over.

In the case of

Gibbons vs. Ogden, 9 Wheat. 1, 229, Mr. Justice JOHNSON concurring, said:

> "Commerce, in its simplest signification, means an exchange of goods; but in the advancement of society, labour, transportation, intelligence, care, and various mediums of exchange, be-

> come commodities, and enter into commerce; the subject, the vehicle, the agent, and their various operations, become the objects of commercial regulation."

On page 231, he further said:

> "If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints."

This definition of what constitutes "commerce" and the purpose of the Commerce Clause have been repeatedly applied by this Court. The definition just quoted shows beyond any doubt that many functions performed by the appellants in operating their chain store enterprises are interstate commerce, without which they could not operate their retail units as parts of such enterprises. In the case of

Minnesota vs. Barber, 136 U. S. 313,

the Court held, as stated in the last headnote:

> "A burden imposed upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting it."

To be sure the record at bar shows that the ascending brackets of this Act apply to those engaged in intrastate commerce as well as those engaged in interstate commerce, and applies to domestic chain store owners as well as foreign corporations operating in Florida. Nevertheless the record shows that the Florida Chain Store Act was directed chiefly against the operations of the so-called "big chains" all of whom are non-resident corporations with their central offices located in New York City, Chicago, and elsewhere.

In the case of

Caldwell v. North Carolina, 187 U. S. 626-627, we find a statement which we think precisely fits the point now under discussion. It is there said:

> "This kind of taxation is usually imposed at the instance and solicitation of domestic dealers, as a means of protecting them from foreign competition. And in many cases there may be some reason in their desire for such protection. But this shows in a still stronger light the unconstitutionality of the tax. It shows that it not only operates as a restriction upon interstate commerce, but that it is intended to have that effect as one of its principal objects. And if a State can, in this way, impose restrictions upon interstate commerce for the benefit and protection of its own citizens we are brought back to the condition of things which existed before the adoption of the Con-

> stitution, and which was one of the principal causes which led to it."

In Shafer v. Farmers Grain Company, 268 U. S. 189, 198, 69 L. Ed. 909, 914,

it is said:

> "Buying for shipment, and shipping to markets in other states, when conducted as before shown, constitutes interstate commerce—the buying being as much a part of it as the shipping."

This definition is certainly applicable to many of the appellants, which must necessarily buy supplies in all parts of the United States in order to keep the current of food products and other commodities handled by them severally, circulating for distribution in their retail units located in Florida and in other states.

In the case of

Furst v. Brewster, 282 U. S. 493, 75 L. Ed. 478, the Court among other things said:

> "Commerce comprehends all the component parts of commercial intercourse between different states, and according to established principle, any State statute which obstructs or lays a direct burden on the exercise of the privilege of engaging in interstate commerce is void."

Like principles were cited in

Ozark Pipe Line Company v. Monier, 266 U. S. text 265,

where the Court said:

"The protection against imposition of burdens upon interstate commerce in practical and substantial and extends to whatever is necessary to the complete enjoyment of the right protected."

In Federal Trade Commission v. Pacific States P. T. Assn. 273 U. S. 52, 71 L. Ed. 535,

the Court held as stated in the fifth headnote (L. Ed.) as follows:

"Interstate commerce is not confined to transportation, but comprehends all commercial intercourse between different States, and all component parts of such intercourse, including the buying and selling of commodities for shipment from one state to another."

In Airway Electric Corporation v. Day, 266 U. S. 71, 69 L. Ed. 169,

it is pointed out that if any part of the taxing act of a State in the nature of an excise tax burdens interstate

commerce, or an *integral part* of a business constituting interstate commerce, the tax is void and must be condemned.

The same doctrine was laid down in the case of

Sprout v. City of South Bend, 277 U. S. 163, 72 L. Ed. 833,

opinion by Mr. Justice BRANDEIS, the eighth headnote of which reads as follows:

> "To sustain an occupation tax on one engaged in intra and interstate business *it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased on account of the interstate business done;* that one engaged exclusively in interstate business will not be subject to the imposition; and that persons taxed could discontinue the intrastate business *without withdrawing also from the interstate business.* (Italics ours)

To like effect is

East Ohio Gas Company v. Tax Commission of Ohio, 283 U. S. 465, 75 L. Ed. 1171, 3 h. n. L. Ed.

opinion by Mr. Justice BUTLER.

When the doctrines of these cases are applied to the Florida Act, as it affects and operates upon the businesses of appellants severally, the Act must fail.

In analyzing the many discriminations created by the Florida Act. and in pointing out its palpable object and purpose, as manifested by its operation and effect, it has been made clear that the discriminatory license fees were not imposed

"solely on account of the intrastate business."

On the contrary that the "amount exacted" was

"increased on account of the interstate business done."

It would be impossible to operate a national chain store enterprise, such as operated by several of the appellants, and divorce the interstate functions thereof—buying, assembling, distributing, etc.—from the intrastate functions thereof—the actual retailing in the retail units of the several states. See Senate Document No. 30, 72nd Congress, 1st Session, Section 1, p 1, quoted p 76 supra; also Section 7 of said Document pages 22 to 27.

We submit, therefore, that there is no escape from the application of the principles stated in the eighth headnote of the Sprout case, supra.

The purpose of the equal privileges and immunities clause of Sec. 2, Art. IV of the Constitution was closely akin to that of the commerce clause. In the case of

Ward v. Maryland, 12 Wall. 418, 430-431,

the Court held void a discrimination against non-resident

traders as being in violation of the equal privileges and immunities clause. In support of the holding the Court said:

> "Inequality of burden, as well as the want of uniformity in commercial regulations, was one of the grievances of the citizens under the Confederation; and the new Constitution was adopted, among other things, to remedy those defects in the prior system."

In the case of

> Travis v. Yale & Towne Mfg. Co., 252 U. S. 60, 70, 64 L. Ed. 460, 469,

the Court said:

> "A general taxing scheme such as the one under consideration, if it discriminates against all nonresidents, has the necessary effect of including in the discrimination those who are citizens of other states; and, if there be no reasonable ground for the diversity of treatment, it abridges the privileges and immunities to which such citizens are entitled."

The record at bar shows that the Act under attack, in undertaking to discriminate against all chain store operators necessarily is chiefly directed against the non-resi-

dent appellants, just as was the case with the North Carolina statute in the case of

Bethlehem Motors Co. v. Flynt, 256 U. S. 421.

The foregoing propositions as to burden upon the interstate activities of the appellants severally and as to depriving them of the equal privileges and immunities of citizens of the several states, have not heretofore been presented to this Court in any chain store case. In the Indiana case the complainant owned and operated all of his business, wholesale and retail, within the City of Indianapolis. The case was deemed a class suit, nevertheless neither the record nor the briefs presented in that case urged either of these propositions. The same may be said of the North Carolina case, although some of the appellants here were appellants in that suit.

We submit, therefore, that independent of the due process clause and equal protection of the laws clause of the 14th Amendment, the commerce clause and the equal privileges clause strike down those provisions of the Florida Act which undertake to impose a greater proportion of burdens upon appellants severally than it does upon so-called independent merchants of that state.

Point 7.

SINGLE COUNTY STATE LICENSE DISCRIMINATIONS. — As Applied to the Factual Situation set up in the Amended Bill and Petitions of Intervention, the Supreme Court of Florida erred in sustaining the Validity of Sub-sections

(1), (2), (4), (6), (8) and (10), of § 5 of the Act, creating Arbitrary and Unreasonable State License Discriminations in favor of Single Store Retail Merchants, and against Chain or Multiple Store Retail Merchants, all doing business in one County—Contrary to the Due Process Clause and the Equal Protection of the Laws Clause of the 14th Amendment.

This Point was raised by § VII. (a) of the Amended Bill, R 14, and by §§ IX. XI. and XIV. of the Amended Bill, R 22, R 27 and R 37. This Point is a condensed restatement of the second, thirteenth and fourteenth assignments of error, R 172 and R 176.

So far as the language of the Florida Act is concerned, sub-sections (1), (2), (4), (6), (8) and (10) of § 5, are substantially the same scheme as sub-sections 1 to 5, inclusive of § 5 of the Indiana Statute (38 Fed. (2) 654), except that the upper brackets of the Florida Act, (6), (8) and (10), are about twice as high per store as the upper brackets of the Indiana Statute. As pointed out in the decision of this Court,

Tax Commissioners v. Jackson, 283 U. S. 527, 534,

the assessment against Jackson's 225 stores in the City of Indianapolis, under the Indiana Statute, was $5443.00. Under sub-sections (1), (2), (4), (6), (8) and (10), of § 5 of the Florida Act, as pointed out by Table 3, page 18, supra, the operation of the same number of stores in a single Florida County would require the payment of arbitrary

bracket fees in the sum of $7520.00—about fifty per cent (50%) more than required by the Indiana Statute.

Besides thus increasing the amount payable under the Indiana scheme, the Florida Statute, as we have seen, added many other discriminations and burdens, such as the County Line discrimination, discussed under Point 1, page 15 supra, the Distributing Warehouse discrimination, discussed under Point 2, page 37, supra, and the County License and Municipal License discriminations, discussed under Point 3, page 51, supra.

Aside from the very great differences in the provisions of the two Acts, the attack made under Point 7, stated above, is predicated primarily upon a *different factual situation* set forth in the Florida record. That is to say, a factual situation differing essentially and materially from that presented in the Indiana case, from that presented in the North Carolina case, and, in fact, different from that presented in any other chain store case previously considered.

It has been repeatedly held by this Court that a statute may be valid as applied to one state of facts, and yet invalid as applied to another.

Dahnke-Walker Mill Co. v. Bondurant,
257 U. S. 282, 289; restriction on buying wheat for interstate commerce;

Muller v. Oregon, 208 U. S. 412—Hours of Labor for women;

Chaselton Corporation v. Sinclair, 264 U. S. 543, 547-8—Housing Emergency Act;

Weaver v. Palmer Bros. Co. 270 U. S. 402—Prohibiting use of "shoddy" in the making of comfortables;

Seattle Trust Co. v. Roberge, 278 U. S. 116, 121—Zoning Ordinance;

Hans Rees' Sons Inc. v. N. C., 283 U. S. 123, 135, 4 h. n.—State Income Tax.

It is a further rule not to be overlooked, that

"What is said in an opinion of this Court must be limited to the facts and issues involved in the particular record under investigation."

German Alliance Insurance Company v. Home Water Company, 226 U. S. 220, last headnote;

"Every opinion of the Court is to be read with regard to the facts of the case, and the question actually decided."

Weaver v. Palmer Brothers Company, 270 U. S. 402.

As we shall subsequently point out, retail distribution, whether through operation of chain stores, or single unit stores, is subject to changing economic conditions. The Court judicially knows that economic conditions have been changing rapidly during the last few years, especially during the period of the depression, which still exists; and, therefore, any examination of practices in retail distribution as of the year 1929, such as shown by the testimony in the Indiana case, is now out of date, and of little value in determining whether or not a separate classification and

discrimination against retail distribution through chain stores is justified.

Atcheson Etc. R. Co. v. United States,
284 U. S. 249, 76 L. ed. 273.

Moreover, as pointed out by Point 8, stated page 14, supra, and subsequently to be considered, the Supreme Court of Florida attempted to predicate its decision upon alleged judicial notice, without allowing any opportunity to take testimony or otherwise test the supposed basis of such judicial notice. Hence it is important that we now bring to this Court's attention, not only the admitted averments of the amended bill, but also supporting data which this Court may judicially notice or consider as authentic information. Thus we shall present a

"factual foundation of *record* for overthrowing the statute."
O'Gorman & Young v. Hartford Fire Ins. Co.
282 U. S. 251, 258.
By the "record and brief" appellants present the "facts disclosing the reasons for the enactment of the present legislation or (and) the effect of its operation."
Hardware Dealers Etc. Ins. Co. v. Glidden,
284 U. S. 151, 158.

The majority opinion of the Supreme Court of Florida having thus cast the burden upon the appellants, the brief for appellants must necessarily be extended in order to bring

to this Court's attention matters which will show the error of the Supreme Court of Florida.

What are some of the outstanding ultimate facts and conclusions which distinguish this case from any case previously considered?

(1) *The Functions of Buying, Financing, Assembling, Warehousing and Distributing, and the Managerial Functions of Planning, Supervising, Watching Turnover, Accounting, etc., whether Advantages or Disadvantages, are performed by most of the Appellants outside of Florida, and, therefore, the State of Florida is not justified in putting such Appellants into a separate and discriminatory License Tax Classification, by reason of such Extra Territorial Exercise of such Functions.*

This general fact may be well illustrated by the business of the Appellant, Montgomery Ward & Company.

In a further report of the Federal Trade Commission upon the chain store inquiry, entitled

"Growth and Development of Chain Stores,"

published and distributed as Senate Document No. 100, 72nd Congress, First Session (of which the Court may take judicial notice), we find on pages 76 and 77, Table No. 4, showing the growth during certain periods of the leading national chain store enterprises in the United States. By that table it appears that on January 1, 1928, Montgomery

Ward & Company was operating thirty-six stores, and that on December 31, 1930, it was operating 556 stores.

The petition of intervention to which Montgomery Ward & Company is a party, R 92, shows that said appellant owns and operates only one store in the State of Florida, at Bradenton, Manatee County, on the South end of the Peninsula. The same section of the intervention shows that said appellant has its headquarters in Chicago, Illinois, but that its Florida retail store is conducted in substantially the same manner that any other similar store is conducted in that part of Florida. With only one retail store in Florida, headquarters in Chicago, and at least 555 retail stores scattered throughout every State in the Union, it must be presumed that said appellant exercises its buying power in Chicago; uses its credit there; devises its accounting system there; controls the stock turnover of its retail stores from Chicago; determines methods of display, and, indeed, performs in Chicago all other functions of a wholesaling and managerial character. If the exercise of such functions by Montgomery Ward & Company outside of the State of Florida could furnish the basis for the imposition of a Florida License tax, then, to be consistent, Florida might be justified in demanding of that concern a bracket arbitrary license fee of $500.00, rather than $5.00, for its one store, as provided in § 5 (1) of the Act under attack. But since that appellant has only the one store the Act concedes, and the authorities administering the Act must necessarily concede, that all of that appellant's extra territorial exercise of functions, wholesaling, managerial or otherwise, are utterly irrelevant, and cannot be resorted to as a justification for a discriminatory license tax, by reason

of the practices employed by that appellant in the conduct of its chain store enterprise. If it were competent for the State of Florida to seize upon that appellant's exercise of such functions outside of the State of Florida, as a basis for the imposition of a discriminatory Florida License tax, then every other State might do likewise, with the result that Montgomery Ward & Company would be taxed 48 times, for the exercise of functions, and the enjoyment of privileges, if they be such, within the State of Illinois and nowhere else. Suppose Montgomery Ward & Company were to open two additional stores in the same County, or in different Florida Counties? In either case we maintain that its extra territorial exercise of functions as aforesaid could not possibly justify the State of Florida in its imposition of the discriminations provided for by secs. 5 and 11 of the Act under attack.

The business of the appellant, J. C. Penney Company is another illustration of the same observations. In Senate Document No. 100, 72nd Congress, First Session, mentioned above, we find in table 4, page 77, that the J. C. Penney Company on December 31, 1930, operated 1452 stores. Section VII. of one of the petitions of intervention, R 91-92, shows that the same J. C. Penney Company operates only three Florida retail stores, one in Columbia County, one in Putnam County and one in Seminole County. It further appears from the introduction of that petition of intervention, R 89, that the J. C. Penney Company is a corporation organized and existing under the laws of the State of Delaware. It is a well known fact on the Stock Exchange, where its stocks are regularly quoted, that the headquarters of the J. C. Penney Company are in New York City, and

hence the chain store enterprise of the J. C. Penney Company, as related to the case at bar, stands upon the same footing as does the chain store enterprise of Montgomery Ward & Company—all of its buying functions and functions of supplying retail units and managerial functions such as mentioned with respect to Montgomery Ward & Company are in like manner exercised by the J. C. Penney Company outside of the State of Florida. As regards its three retail units in Florida, operated in three different counties, there is no integration whatsoever existing in the State of Florida. We have just observed that the statute itself admits, and the State officers of Florida admit, that they are not concerned with what Montgomery Ward & Company does outside of the State, and can go no further than bracket (1) of section 5 of the Act, plus the $3.00 per $1,000.00 on stock carried in the one retail unit. That being true as to the one unit, it should also be true as to the three units owned and operated by the J. C. Penney Company; and what should be true of three units operated in different counties should also be true regardless of the number of retail units operated in Florida, or in any other particular State.

The business of the appellant, Louis K. Liggett Company is a further illustration. In sec. VIII. of the amended bill, R 19, it is shown that the Liggett Company operates 22 stores in different counties of Florida; that parts of its retail stocks carried in those stores are supplied from factories outside of the State of Florida, and parts from the Company's warehouse in New York City, upon weekly or bimonthly requisitions from the individual retail stores, received by mail, wire or otherwise, in interstate commerce. Thus again, it appears that the Liggett Com-

pany performs its buying and assembling functions, warehousing functions, distributing functions and managerial functions outside of the State of Florida, and that as between its retail units within that State there is no integration whatsoever—at least none existing within the limits of the State of Florida.

We have seen in discussing the distributing warehouse discrimination, Point 2 of this argument, page 37, supra, that §§ 5, 2 and 8 of the Act under attack operate to create a distributing warehouse discrimination against chain store operators in the form of an excise tax of $3.00 per $1,000.00 on goods carried in such distributing warehouse. Such additional excise tax, even if it were only $1.50 per $1,000.00, the amount charged to regular wholesalers, could be justified only on the ground that such warehousing privilege was exercised *within* the State of Florida.

In the case of

> St. Louis Compress Co. v. Arkansas, 260 U. S. 346, 67 L. ed. 297,

Mr. Justice HOLMES delivering the unanimous opinion of the Court, said:

> "It is true that the State may regulate the activities of foreign corporations within the State, but it cannot regulate or interfere with what they do *outside*." (Italics ours.)

The Arkansas case was followed in

Campania Etc. v. Collector, 275 U. S. 93-95,
72 L. ed. 181,

the Court observing:

"Taxation is regulation just as prohibition is."

Again. in the case of

Farmers Loan & Trust Co. v. Minn. 280 U. S. 204,
214, 74 L. ed. 371, 376,

Mr. Justice STONE delivering a concurring opinion, said:

"To sustain a privilege tax the privilege must be enjoyed in the State imposing it."

Obviously, therefore, the State can collect no warehousing tax, that is to say $3.00 per $1,000.00 on goods carried for distribution through retail units, upon any part of the goods warehoused and stored by the Liggett Company in its New York warehouse. Such warehousing being exercised in the State of New York, is entirely beyond the jurisdiction of the State of Florida, and no State can impose any excise tax for the exercise of that privilege other than the State of New York. The same rule must apply, we think, as to Liggett Company's exercise of other functions or privileges necessary to the conduct of its chain store enterprise in many States. It appears by table 4, page 76 of the aforesaid Senate Document No. 100, that the Louis K. Liggett Company, on December 31, 1930, owned

540 retail stores. But if the function or privilege of buying for all those stores is subject to an excise tax, such tax cannot be imposed by any State other than the State of New York. The same observations can be made as to its credit arrangements, however extensive, its cash discounts, if any, its employment of capital; its accounting system, however complete; its control of stock turnover, however rapid; its superior quality, if any, of management and methods; its centralization of management, its standardization of management, sales policies, etc. All of these functions, being exercised outside of the State of Florida, they are entirely beyond the reach of that State for any purpose—license taxation or otherwise. If the Liggett Company were to close up 21 stores in Florida, it could continue to exercise the functions last mentioned in precisely the same way, and yet the State of Florida admittedly could not exact of the Liggett Company more than state fee of $5.00 for the operation of that one remaining store, plus $3.00 per $1,000.00 on stock, although it would be a "chain store" precisely of the same character as the hundreds of other stores operated by that appellant in other States. That is precisely the same situation pointed out relative to Montgomery Ward & Company with respect to its one Florida store.

We may briefly consider the business of the Mellville Shoe Corporation for another illustration. In table 4, page 77 of the aforesaid Senate Document No. 100, it appears that the Mellville Shoe Corporation in December, 1930, operated 480 retail stores in different parts of the United States. Section V. of one of the petitions of intervention, R 90, shows that said corporation operates seven retail stores in different counties of Florida. At page 55 of the

record in the case of Penney Stores, Inc. v. George T. Mitchell, et al., dismissed by this Court on stipulation of counsel, on November 14, 1932, it appears that all merchandise sold by Mellville Shoe Corporation through its two Mississippi retail shoe stores is manufactured by the Mellville Shoe Corporation at Worcester, Massachusetts. Presumably the same is true relative to the merchandise sold through its seven Florida retail shoe stores. It follows, therefore, that it must go out and buy at sources of production the raw materials for the manufacture of shoes, provide for their transportation; do its financing; its manufacturing; and then its distribution upon requisitions received in interstate commerce from its several store managers in Florida and in other States. None of these extra territorial functions concern the State of Florida.

Similar observations might be made as to the candy and confectionery business of The Nunnally Company, as described in its petition of intervention, R 85. And similar observations might be made as to each of the other appellants, save perhaps three of the grocery companies, i. e., Winn & Lovett Grocery Company, the Southern Stores Corporation and the South Florida Stores Corporation. But here again, it must not be overlooked that this is a several appeal. The present appellants other than such grocery companies, stand upon an entirely different footing from the status occupied by Jackson, the complainant in the Indiana case. The record in that case shows that Jackson operated 225 retail grocery stores, also certain warehouses—all, however, within the City of Indianapolis. The result was that all integration of his business existed and was enjoyed in that jurisdiction. It is true that he had to

buy goods outside of Indiana and have them shipped to his distributing warehouses within the State of Indiana, but when they reached the warehouses they came to rest, and all other functions exercised by him in the conduct of his chain store enterprise were carried on within the State of Indiana. It follows, therefore, that the Florida case, as to nearly all of the appellants, is clearly distinguishable on that ground, as well as many others.

The Point under discussion was very clearly brought out by the decision of this Court in the case of

Hans Rees' Sons Inc. v. North Carolina,
283 U. S. 123, 75 L. ed. 879,

involving the North Carolina Income Tax law. On the factual situation presented by the record in that matter, this Court reversed the North Carolina Court and held that the contention of the State as to the allocation of income tax could not be sustained, and that the application of the statute sought to be made by the North Carolina authorities was void, because they sought to impose an allocation based on income earned and derived from business conducted outside of that State. Such application of the statute as had been made by the North Carolina Court was held to be in derogation of the 14th Amendment.

A similar construction of the New York Income Tax Law was made in the case of

People ex rel Alpha Portland Cement Co. v. State Tax Commission, 230 N. Y. 48, 129 N. E. 202, certiorari denied 256 U. S. 702, 65 L. ed. 1179,

opinion by Justice CARDOZA. Among other things, he said:

> "The statute prescribes a rule of allocation which, as applied to foreign corporations holding bonds and shares in other states, involves the artificial and arbitrary augmentation of the *value of the local privilege.*" (Italics ours.)

The same proposition has in a number of recent cases been applied by this Court to inheritance taxes, taxes on intangibles, and the like.

> Francis Biedler II. v. South Carolina Tax Commission, 282 U. S. 1, 75 L. ed. 131, (2 h. n. L. ed.);
> Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204, 74 L. ed. 371 (1, 3 and 4 h. ns. L. ed.);
> Baldwin v. Missouri, 281 U. S. 586, 74 L. ed. 1956, (3 h. n. L. ed.);
> First Natl. Bank of Boston v. State of Maine, 284 U. S. 312, 76 L. ed. 313—where a succession tax on intangibles (corporate stock) was held void.

In the last cited case the Court pointed out that before a tax upon a privilege can be sustained, there must be

> "a real taxable relation to the event which is the subject of the tax."

We submit, therefore, that in testing the Florida Act the test must be applied solely and exclusively to privileges enjoyed by appellants severally within the State of Florida, in comparison with like privileges enjoyed by other merchants engaged in the same lines of business. When such test is applied the discriminatory and arbitrary character of the Florida Act becomes manifest. This is so if we consider only sub-sections (1), (2), (4), (6), (8) and (10) of § 5 of the Act, without regard to the different County discriminations, the Distributing Warehouse discrimination, and the County License and Municipal License discriminations previously pointed out.

> (2) *Economic Changes in Florida since the World War—Construction of Paved Highways, Increased use of Fast Motor Vehicles, Shifting of Population from Country to Cities, Decentralization of Cities, and Establishment of numerous Sub-trading Centers—Changes in the Trading Habits of the Public—have Necessitated a very great Increase in the number of Retail Units, both of Chain Stores and of Independents; Whereas the Florida Act deprives Appellants Severally of the right to Increase the number of their Retail Units, and deprives them of the Right to freely Compete with each other, and with Independents, in a common Occupation of Life.*

The record in the Indiana case (283 U. S. 527) does not explain, nor did the briefs filed in that cause explain, WHY Jackson had 225 retail grocery stores in the City of

Indianapolis. In the absence of any such explanation, the majority opinion (283 U. S. 541), said:

> "More and more persons like the appellee have found advantages in this method of merchandising, and have therefore adopted it."

In § VI. of the amended bill at bar, R 9, it is, among other things, said:

> "That during the period from 1900 to 1919, with the coming of the automobile and a large shifting of population from the country to the cities, the chain store took on a more rapid growth."

And in the same section of the amended bill, R 12, it is further said:

> "Your orators would further show that the more general use of motor vehicles during the last decade, and the development of state and national highways have also had a material influence on the growth and development of the chain store method of merchandising. That two decades ago the shopping district of any city of consequence was in a comparatively restricted area, for groceries, as well as dry goods, and other retail merchandise. But with the advent of the automobile residential districts spread out over wide territory, and

> as the use of motor vehicles increased the congestion in the shopping district became so great that the consumers demanded a more convenient place to shop, with the result that small shopping centers began to develop, widely scattered, convenient to residential districts. That in the grocery line the chain store was a natural means of serving such individual community centers, and the same is true of the drug line. That on account of this economic change the so-called independent single store operators would have a monopoly in such small trading centers if the chain store operator is prohibited by discriminatory legislation from having more than one store."

The amended bill, R 13, further alleges that the construction of paved highways by State and Federal aid, throughout the country, including the State of Florida, has destroyed the isolation of farms, timber camps, etc., because with the use of swiftly moving motor vehicles such trade now comes to the large centers, such as Jacksonville, where they can have the advantage of better shopping facilities, and at more competitive prices. All of these averments in the amended bill, as well as others, were admitted by the motion to dismiss filed by the appellees.

The averments of § VI. of the bill, last above referred to, are sustained by further parts of the amended bill in this cause and exhibits thereto attached, for example, the

City Directory, exhibit 3 to the amended bill, and the newspaper advertisements, exhibit 4 to the amended bill.

The copy of part of the City Directory, exhibit 3, R 61 to 71, gives the street address of each of the 388 grocery stores then operated in the City of Jacksonville. Exhibit 4, being certain pages from the "Florida Times Union" of September 12, 1931, shows on page 12 a full page advertisement of "Better Food Stores", and on the margins of that advertisement appear the street addresses of the several stores operated under the name "Better Food Stores." The location of each such store, and the location of each "Whiddon" store shown by the directory represents a sub-trading center within the limits of the City of Jacksonville, and in each such sub-trading center will be found a group of grocery stores, filling stations, and one or more drug stores.

As to the grocery business, the amended bill presents even a more concrete study and showing as to the effect of the economic changes above mentioned.

In § XI. of the amended bill, beginning R 27, it is said that there is very keen competition in the grocery business in the State of Florida, and that competition exists at each of the sub-trading centers in the City of Jacksonville, as indicated by the street addresses shown by the City Directory, and by page 12 of exhibit 4, being the addresses of "Better Food Stores."

The averments of the amended bill concerning the economic changes now under consideration are also sustained by the Federal Census Reports for Florida (judicially noticed). The Census Reports for Florida for 1910, 1920 and 1930 show the following:

	1910	1920	1930
Total Population of the State	752,619	968,470	1,468,211
Total Urban Population	219,080	355,825	759,778
Total Rural Population	533,539	612,645	708,433
Total Rural-Farm Population		279,370	274,949
Total Rural-Nonfarm Population		333,275	433,484

These figures are significant in showing that the total population of the State during the last twenty years has about doubled, but that the total rural farm population was in 1930 much less than it was even in 1920, and this though we take into consideration the fruit growing and vegetable industries in the southern part of the State.

Further interesting facts are disclosed by examination of the census for the same periods covering the northern tier of the Counties of Florida, from Leon County east to Duval County, and we find the following:

	1910	1920	1939
Jefferson County	17,210	14,502	13,408
Madison County	16,919	16,516	15,614
Suwannee County	18,603	19,789	15,731
Columbia County	17,689	14,290	14,628
Hamilton County	11,881	9,873	9,454
Nassau County	10,525	11,340	9,375
Duval County	75,173	115,540	155,500

These figures reveal the fact that in each of these counties except Duval the population has steadily decreased since 1910. This is particularly noticeable in counties heretofore chiefly engaged in agriculture, such as Jefferson, Suwannee and Hamilton.

Along with these tremendous decreases in the farming sections, we find the following census figures as to the City of Jacksonville:

	1900	1910	1920	1930
Jacksonville	28,429	47,699	91,559	129,459

The statutes of the State of Florida have from time to time designated by number what highways should be constructed by the State Road Department, so that the Courts judicially know that Jacksonville, whose population has so tremendously increased during the last three decades, is now readily accessible over paved State highways from every direction—State Road No. 17 from Fernandina; No. 4 from Waycross; No. 1 from Tallahassee and intervening points; No. 13 from Gainesville and Starke; No. 3 from Palatka and Green Cove Springs; and No. 4 from Daytona Beach and St. Augustine. On account of these paved highways and speedy small type automobiles now in use, all of the small towns within a radius of fifty to one hundred miles of Jacksonville have become mere suburbs of the City of Jacksonville, so far as shopping purposes are concerned. It follows that the small towns along these numerous paved highways have lost their trade in two ways: (1) the shifting of population from rural farm communities to cities; and (2) the shifting of trade from that part of the population still remaining in the small towns and rural communities to the large centers.

The economic changes in the shifting of population and in the trading habits of the public have not been confined to Florida. On the contrary, we find they have been general throughout the United States.

We now call the Court's attention to further data, competent for consideration under the following decisions:

Standard Oil Co. v. United States,
283 U. S. 163, 171, 172, 176, 177 and 178; and footnotes 5, 6, 10, 11, 14, 16 and 17;
Frost v. Corporation Commission, 278 U. S. text 549, footnote 35;
St. Louis Etc. R. Co. v. United States,
279 U. S. 514 to 519, and footnotes 49 and 52;
Indian Motocycle Company v. United States,
283 U. S. 570, 581, footnotes 1 and 2.

In 1926 the United States Department of Commerce published a pamphlet entitled

"Retail Store Problems,"

also known as "Domestic Commerce Series—No. 9." That pamphlet represents a series of impartial investigations made under government supervision. At the bottom of page 21 it was noted that Dr. Copeland, in an article which appeared in the "Harvard Business Review," pointed out that from the standpoint of the consumers' buying habits, retail stores are roughly divided into three classes: (1) Convenience goods; (2) Shopping goods; (3) Specialty goods. The subsequent discussion shows that by "Convenience goods" is meant groceries and drugs, and other commodities usually put up in standard packages, or sold by standard grades. "Shopping goods" are such as clothing, jewelry, hardware and the like. To like effect was the testimony of Mr. Lyons in this Court's record of the In-

diana case, page 73. Beginning at page 93 of the same pamphlet is a reprint of Bulletin No. 394, subject "Vehicular Traffic Congestion and Retail Business," and at page 95 of that pamphlet, embracing that bulletin, it is pointed out that as our Cities continued to grow the acute congestion of traffic pushed the population away from the centers to widely distributed residential communities. Beginning at page 108 of the same pamphlet some of the effects of such congestion on the buying public are noted—danger element, loss of time, inconvenience, anxiety, etc. At page 111 it is further said:

> "Necessary business which cannot be satisfactorily transacted in one location will find a location where it can be transacted. *It is natural for store patronage to follow the line of least resistance.*" (Italics ours.)

It is then noted that as a result sub-trading centers have been established where the customers can be conveniently served; and the bulletin embraced in said pamphlet continues:

> "The subcenter shopping district no longer consists of only the corner grocery, a drug store and a delicatessen. It includes stores representing all kinds of merchandise and usually a bank. In our largest cities the subcenter is a complete shopping district, differing from the down-town district only in size and magnitude of establishments . . . In some of our

> **largest cities down-town merchants have sensed the situation and are establishing branch stores in subcenters."**

On page 112 of the same pamphlet we find this very pertinent paragraph:

> **"If that retail business which cannot be accommodated in our decentralizing cities is being diverted to each city's subcenter shopping districts, what of that business in centralizing cities and small communities? These cities and communities do not face the problem of having trade diverted within their own limits; rather their problem is of having trade diverted to neighboring cities and communities. The present survey indicates that no small proportion of the trade in one community finds its way by means of the automobile to the next largest community or city, and so on until this chain of diverted trade reaches the metropolis, where traffic congestion is so great that the owner-driven automobile is seldom used for shopping purposes and where entrance to the City is made by means of train and bus. It appears, therefore, that both the merchant of the decentralizing city and the merchant of the centralizing city must meet the problem of diverted trade. In the former case it spreads out within the City limits; in the latter, it has left the City for the next largest community."**

Further study of the same subject,—the shifting of population and the effect of motor traffic,—was made by a Committee on Business Research of the University of Nebraska, and the result of their studies was published in 1927, and entitled:

> "The Influence of Automobiles and Good Roads on Retail Centers."

That study contains tables showing the extent of the shifting in trade from small centers to larger ones, and it is pointed out that the trade in groceries most of all remains at the local center. At page 39 of that study it is pointed out, just as in Bulletin No. 394 above referred to, that in the large centers, such, for example, as Jacksonville, Florida, subtrading centers have been established as a *necessity*, due to traffic congestion in former retail trading districts. In the concluding part of that pamphlet, it is said:

> "In the past the country merchant knew very little of this competition, but the automobile has brought him face to face with it . . . After all it is not so much the country merchant against the city merchant as it is the small community against the larger one."

At page 59 of the same pamphlet it is further pointed out that *such economic changes have also produced cooperative buying, better methods of merchandising, and that these have been adopted by all progressive merchants without distinction.*

The same economic changes are discussed by Professor E. C. Buehler, of the University of Kansas, in his "Chain Store Debate Manual," (1931), page 23. He points out that in 1910, 60% of the people lived in the country and small towns, whereas in 1930 the ratio had been completely reversed, 60% in the cities and 40% in the country and small towns.

The same observations were made in a study by Professor Marc N. Goodnow, of the University of Southern California, in an article appearing in "Nations Business" for December, 1931, at page 28. He discusses and cites figures to show the extent in the shifting of trade from small towns to large centers, due to the construction of highways and the use of automobiles.

Another instructive study on the same subject is by Professor W. Russell Tylor, of the University of Illinois, entitled:

"The Exodus of Rural America,"

appearing in "Current History," issue of December, 1931, beginning at page 404. Professor Tylor notes in particular two tendencies above discussed: (1) the centralization to the larger cities; and (2) the decentralization of the larger cities producing growth of suburbs and subtrading centers.

The studies above cited, supporting as they do the averments of the amended bill, account very largely for the very great increase in the number of retail units for the distribution of "convenience goods", groceries, drugs, etc. in the larger towns and cities, such as Jacksonville, Florida, to which population has been drawn, and where that population has decentralized into suburbs, demanding for con-

venience the establishment of a great number of subtrading centers.

Some further observations are pertinent as to the effect of the construction of paved highways all over the State of Florida, and, for that matter, all over other states, and the increased use of fast moving motor vehicles. We have noted that the amended bill, R 13, alleges that the construction of highways and the use of automobiles has destroyed the isolation of farms, timber camps, etc. The effect of those economic changes on the trading habits of the public, is further illustrated by the petition of intervention to which Montgomery Ward & Company is a party, R 92, where it is said:

> "That within the last few years it has opened a number of retail stores in different parts of the United States, and has opened one such retail store in Florida."

Also: "That it carries in said store a large assortment of general merchandise such as is usually found in a small department store."

In this Court's record of the Indiana Chain Store case, bottom page 85, Mr. Lyons testified that the two great mail order houses, Montgomery Ward & Company and Sears Roebuck & Company, had within the last two years, that is two years prior to January, 1930, the time when the testimony was taken in the Jackson case, entered the chain store field. At page 112 of the same record Dr. P. H. Nystrom testified (January, 1930):

> "It also begins to look as if the mail-order houses, would soon become important chain store factors. Sears, Roebuck & Company have apparently started out to establish a chain of department stores, most of which at the beginning of 1928 were located in the larger cities, but Montgomery, Ward & Company has commenced a plan of establishing unit stores mostly in medium and small sized towns."

We have previously noted, quoting Senate Document No. 100, 72nd Congress, First Session, that on December 31, 1930, Montgomery, Ward & Company then operated 556 retail stores — small department stores — distributed throughout the United States. We have also previously noted that at the same time the J. C. Penney Company owned and operated 1452 stores in different parts of the United States, but only three in Florida, purposely located, as stated in its petition of intervention, R 91-92, in towns of moderate size,

> "where its stores, carrying high grade merchandise, wearing apparel, and goods usually found in a small department store will be accessible to farmers, laborers and other classes of working people, who have limited means, and desire to avail themselves of the opportunity to buy standard goods at low prices."

Thus it appears that the same economic changes which have caused the mail-order houses to enter the chain store

field have also operated to increase the number of retail units by an enterprise such as that conducted by the J. C. Penney Company. With the construction of net works of paved highways and the increased use of rapidly moving motor vehicles, the mail-order house lost its prestige theretofore enjoyed by distributing voluminous catalogues and shipment of merchandise by mail and express. Moreover, the large department stores in the principal trading centers, such as Cohen Brothers, in the City of Jacksonville, were drawing a tremendous share of the "shopping goods" trade from the remainder of the population still in the country and small towns. The trading habits of the public generally had established a buyers' market. The result has been that such retail units as those of Montgomery, Ward & Company and J. C. Penney Company have gone into direct competition with the large department stores in the larger Cities.

In this Court's record in the Indiana Chain Store case, p. 111, Dr. Nystrom testified: that the increased use of automobiles and the development of good roads have so changed the habits of the buying public

> "that the small community without a chain store is almost hopelessly lost. But the small community, with a chain store, offering big city trading conditions and prices keeps on being a trading center, not only for the chain store, but for other retailers as well; so that the trade of the small community is saved by the existence of the chain store."

In this Court's record in the Mississippi Chain Store Case, Penney Stores, Inc. v. George T. Mitchell, et al., dismissed by stipulation of counsel, November 14, 1932, undisputed testimony was given at pages 261 and 264, to the effect that

> "The operation of a store of J. C. Penney Company, Inc. in a town is positively beneficial to the other retail merchants . . . J. C. Penney Company, Inc. never locates a store in a community unless it is invited to do so."

Since the trading habits of the public have thus directly caused such increase in the number of retail units, and since the public is the actual beneficiary of this new development in retail distribution, not only in the sub-trading centers of the larger cities and towns, but as well in the small communities desiring to save a part of their trade, no possible basis remains for punitive legislation directed against the operation of more than one retail unit by the same owner.

Notwithstanding the economic developments above demonstrated, it may still be contended that chain stores have absorbed the major part of the increased demand for more retail units, and that the mortality among "independents" is largely chargeable to the chains. These matters have been officially investigated, so that we are again entitled to bring to the Court's attention the results thereof.

In Senate Document No. 100, 72nd Congress, First Session, the Federal Trade Commission's letter of transmittal,

dated June 11, 1932, notes the fact that in public discussion it has been supposed that the chain had an important role in reducing the number of independent stores, either through buying them out, or as a result of competition. The letter of submittal shows that the inquiry covered openings and closing of 1591 chains, up to December 31, 1928, and partially through the years 1929 and 1930. The letter further points out:

> "Of the total acquisitions by reporting chains it is estimated that only 12 per cent were acquired from independents, thus accounting for less than 2 per cent of the total growth of chains through 1928."

Also that

> "Acquisitions as a whole were predominantly of chain stores rather than of independent stores."

As to chain store closings, the letter of transmittal further points out that

> "More than half (5,853) of the total closings reported were in the two years, 1927 and 1928. Beginning with 1920, the closings show a constant and sharply increasing trend from 204 units in that year to 3,298 units in 1928."

At page 8 of the report it is pointed out that the striking increase in ratio of acquisitions shown in the years 1925 to 1929

> "may not be anything more than the accompaniment of the boom period combined with the fact that about this time or a little earlier the *investment banking houses* had discovered the chain store. This situation is confirmed to some extent by the correspondingly abrupt decline of acquisitions to 11.1 per cent of the total additions in 1930, and a decline in the ratio of acquisitions to stores in operation on January 1 of from 6.2 per cent in 1929 to less than 1 per cent in 1930."

If the report of closings had included 1931 and 1932 it would appear that the peak of increase was reached in 1928, and that chain stores, like other businesses, have fallen in piles, due to the economic depression. The Treasury reports show that in 1931 nearly 2300 banks failed in the United States. Chain stores and "Independents" have not escaped.

Along with the foregoing data as to openings and closings of chain stores, the letter of the Federal Trade Commission, transmitting Document No. 100, gives the following comparison in openings and closings of "Independents":

> "A comparison for the 10 years, 1919-1928, of the openings and closings of chain-store units, as

> reported to the commission, with the corresponding figures of Buffalo, N. Y., independent merchants in the grocery, drug, hardware and shoe fields (published by the University of Buffalo, Bureau of Social and Business Research) indicates that the opening rate of independent stores is substantially *higher* than that for the stores of chains. On the other hand, the independent closing rate is nearly as high as their rate of openings, whereas the chain rate of closings is roughly one-fourth that of their openings." (Italics ours.)

Thus it is demonstrated by the Federal Trade Commission that while there was up to the end of 1928, and possibly to some time in 1929, a large increase in the number of chain store retail units, there was even a greater increase in the number of single store retail units, even though the latter did not have the impetus supplied by the *investment banking houses.*

It is obvious, therefore, that the changes in the buying habits of the public, and the very great increase in the number of subtrading centers, as previously pointed out, have been chiefly responsible for the very great increase in the number of retail units of all types of ownership.

This brings us to the inquiry of whether or not chain stores have been in any measure responsible for the mortality among "independents?" In answer to this inquiry, we now ask the Court's attention to a bulletin issued by the

United States Department of Commerce in 1932, designated "Domestic Commerce Series, No. 59," subject

"Causes of Failure among Drug Stores."

The foreword of the bulletin, among other things, says:

> **"The drug store of today little resembles that of a few years ago. Changes have been frequent, and the results accruing have been profitable to many druggists throughout the country. But a great number have been unable to keep pace with the progress made by the more efficient."**

It is further shown that the survey was conducted in 1931 by the Department of Commerce in the City of St. Louis, with the aid of certain well known organizations, covering thirty failed drug stores. The bulletin shows, beginning page 4, the causes of the failures predominating in the order stated: Insufficient capital, Inexperience, High Rent, Poor Business Location, Poor Business Management, Dishonesty, Bad-Debt Losses, and Inadequate Records. Pages 10 et seq. of the bulletin discuss

> "Causes of Failure beyond Control of those who Failed."

It is then noted that eleven out of the thirty druggists reported that the primary cause of their failure was the "business depression," but upon analysis it was found that

six were insolvent from the time they entered business; that of the eleven none kept adequate records; that ten of the eleven were charged with gross incompetence; that in four cases a majority of the creditors reporting charged unethical practices. On page 11 of the same bulletin, on the subject of "Competition," it is shown that twelve of the thirty druggists had claimed that their failure was due to competition, but upon investigation it was found that in only one case was that the apparent cause; that a large chain store organization had a very attractive store directly across the street from the druggist who failed, and there did not seem to be sufficient business in that immediate neighborhood for both stores. That ten of the group stated they were unable to remain in business because there were too many other drug stores (not chain stores) in their immediate neighborhood. Four of the group of thirty expressed a desire to be quoted to the effect that

> "Although they had chain store competition, it affected their businesses only remotely and was in no way responsible for failure."

Under that section the bulletin further says:

> "There are many examples in all lines of business which show that the merchant with ability and willingness to work, to utilize improved methods and to take advantage of new conditions, and with a reasonable margin of capital, succeeds in the face of unusually keen competition."

We next ask the Court's attention to information made available on November 7, 1932, by the United States Department of Commerce as to the principal causes of bankruptcy during the last twelve years. The major aspects of that survey are set forth in the U. S. Daily of November 8, 1932, page 1, column 5, and page 7, column 1. It is said that inefficient management and unwise credit were the principal factors; that the depression had a negligible influence. Dealing more with details, the survey pointed out, among other things, that the vast majority of bankrupt concerns were small enterprises, employing small capital of $5,000.00 or less; that over 68% of the owners or managers had not completed a high school education; that over 57% of the bankrupt businesses had no accounting records; that the accounting records of an additional 28% were inadequate for the needs of the business. That survey plainly shows that chain store competition had little or no influence whatsoever on such bankruptcies of retail concerns.

A study of the changes in the buying habits of the public, and their effect upon retail merchants undertaking to serve the public, would not be complete without also taking into consideration the further fact that the splitting of a business into many units carries additional overhead; additional rents, light and water bills, more employees, a separate manager for each store, and, in fact, a complete list of overhead expenses for every unit; much of which could be avoided if the same volume of business could be done under one roof. All these factors apply to every chain store unit to the same extent as to single store units. Moreover, the single store owner carries no cost incident to warehousing, or the assembling and distribution of the

goods; sustains small losses on account of declining prices, as compared with chain store volumes; all of which, coupled with the personal equasion and contact with customers, give independents operating in Florida an even break for the consumers' dollar.

We now submit that the changed economic conditions and the changed buying habits of the public are chiefly responsible for the great increase in all types of retail units, rather than the profits derived from operations. But in any event, the Florida Act, particularly § 8, paid no regard to profits or size of business. Instead, the tax is measured by the number of places of retail sales, and hence it again seems to us that comparison of advantages or disadvantages, or the profits derived from one type of operation or the other, are for the most part entirely irrelevant.

If the American principle of free competition in domestic trade is to survive, then every merchant must be allowed to split his business, if he so desires, in order to compete on equal terms with other merchants, not only in primary trading centers, but also in sub-trading centers and in small town centers.

Dr. Miles Medical Co. v. Park & Son Co.,
220 U. S. 373, 394, 400, 404, 406.

The Federal Trade Commission has been pursuing chain store inquiry for about four years. As yet the Commission has not found or reported anything in regard to the operation of chain stores which warrants remedial legislation, much less punitive legislation. If any evil had been found the Anti-Trust Act, or some such remedy, should be

applied—not a tax measure in disguise. The Florida Act operates to foster monopoly, rather than otherwise.

New State Ice Company v. Liebmann,
285 U. S. 262.

If it be contended that such statute is necessary to protect independents, then

"This shows in a still stronger light the unconstitutionality of the tax."
Caldwell v. North Carolina, 187 U. S. 622, 626.
People v. Gilson, 109 N. Y. 399. 17 N. E. 343, quoted page 61, supra.

(3) *Improved Retail Distribution Practices, locally Employed in Florida by Chain Stores, are being Employed with equal Success by Voluntary Chains and Wide Awake Independents, with the result that No Taxable Difference exists by Reason merely of the Character of Ownership.*

This question was to some extent considered by this Court in the Indiana case (283 U. S. 527, 535) where the majority opinion said:

"With respect to associations of individual stores for purposes of cooperative buying, exchange of ideas as to advertising, sales methods, etc., it need only be remarked that these are voluntary groups, and that series of independent units cannot, in the nature of things, be as efficiently and successfully integrated as

a chain under a single ownership and management."

We shall first take note of what was before the Court on that subject, and then point out the very great changes which have taken place in the three years since the testimony in the Indiana case was taken, and we shall take particular note of Florida conditions as they exist at this time. In short, we propose to show that the Florida record presents an entirely different factual situation.

The record brought to this Court in the Indiana case shows that the testimony as to "voluntary chains" was given by Mr. Robert W. Lyons, and by Dr. P. H. Nystrom of Columbia University. The testimony of Mr. Lyons on the subject of "voluntary chains" as they then operated in Indiana, in the latter part of 1929 (testimony having been taken in January, 1930), appears pages 75, 76, 89, 90 and 91 of the Indiana record filed in this Court. The testimony of Dr. Nystrom on the same subject appears in the Indiana record filed in this Court, pages 102, 103 and 104. At page 75 of that record Mr. Lyons spoke particularly with reference to the Independent Grocers' Alliance, with headquarters in Chicago, then operating in Indiana, there being then affiliated with that organization some 10,000 retail food merchants. He outlined on pages 75 and 76 the general plan of cooperation between the Alliance and its so-called independent retail units. At page 89 of that record, Mr. Lyons further said:

"The cooperative plan has made it possible for the individual merchant using that system to

operate his business with as much profit as can be found in chain store operation."

Following that statement, he gave further details as to the plan of operation used chiefly by the Independent Grocers' Alliance. At page 90 of that record, Mr. Lyons said:

"Under the cooperative plan, as distinguished from the chain store plan, generally the management of the store and its ownership remains in the party operating the unit, the independent merchant who has his own capital and stock."

On pages 90 and 91 of that record Mr. Lyons further compared the methods of advertising pursued by the Independent Grocers' Alliance and that pursued by some of the chain stores.

At page 102 of that record, Dr. Nystrom said:

"I do not know of any quality that contributes to good merchandising which is available to chain stores that is not also available to unit stores."

At page 103 he said:

"The co-operative movement is a very live movement and is progressing over the country almost like a *tidal wave*." (Italics ours)

He then referred to the survey just completed in December, 1929, by the American Institute of Food Distribution, and quoted figures from that publication as to the

progress being made in the organization of "voluntary chains." That reference to the latest survey of the subject shows that the record before this Court in the Indiana case was certainly limited in its scope to the developments which had taken place up to the end of 1929. *What has happened since then is new matter, and what has happened in Florida is new matter.* At page 103 of that record Dr. Nystrom further said:

> "I do not know of any advantage in price growing out of quantity buying which is available to the chain store that is not also available to these co-operative groups. In addition to buying, additional service is rendered to members of the co-operative group by the co-operative organization."

At page 104 of the record he said:

> "I feel sure that the buying advantage of chains not only can be, but has been equaled by co-operative buying groups."

What does the Florida record show on this subject?

Section XI. of the amended bill, R 27 to 35, shows what "voluntary grocery chains" were doing in Florida shortly before the filing of this suit—that is to say, during September and October, 1931. As before mentioned, the full page advertisement of "Better Food Stores" is shown on page 12 of the newspaper, Exhibit 4 to the amended bill. At R 28 it is alleged:

> " 'Better Food Stores' are a group of individually owned grocery stores affiliated with Lewis-Chitty Consolidated Grocery Company."

Then follow averments that the wholesale Company owns and operates branch wholesale houses at Tampa, Orlando, Cocoa, Miami and at other points in the State. The advertisement page 12, Exhibit 4, is then referred to calling attention to the fact that the slogan of "Better Food Stores" is

> "Individually owned, Operated Collectively—Your Neighborhood Grocery Stores."

It is next shown that "Better Food Stores" is a trade name, belonging to a corporation, the title of which is "Better Food Stores, Inc.," organized June 8, 1931, by certain stockholders and business associates of the wholesale Grocery Company. It is further shown that the Bill which was afterwards passed in the First Extra Session of the Legislature was substantially a copy of a similar Bill that had been introduced in the regular session, and therefore, the organization of "Better Food Stores, Inc." was merely a buffer between the wholesale Grocery Company and the retail units with whom it expected to affiliate, the intermediary or buffer organization between the wholesaler and the "individually owned" retail units would be sufficiently broken as not to subject the "individually owned" retail units to the ascending bracket license provisions of § 5 of the Act, then in contemplation. At R 29 the amended bill further avers that the formation of such

"cooperative groups as represented by said 'Better Food Stores' has been encouraged and fostered by the discriminations created by said Act."

It is next shown that many other similar cooperative chains have been formed and fostered since the passage of said Act

"being assured thereby that they could so operate without being subjected to the excessive and discriminatory graduated license fees provided for by said Act."

The rapid growth of "Better Food Stores" is then shown, and it is then alleged that there is not only a group of stores operating under that name in and around Jacksonville but also in and around each of the other cities where the wholesale company owns and operates wholesale warehouses, as above mentioned.

The character of the affiliation between the wholesaler and such "individually owned" grocery stores is then alleged, and as one illustration of that relation, a copy of the "Clover Farm Stores" contract is attached to the bill as Exhibit 5. Further, at R 30-31, it is alleged that

"by such affiliations and cooperative organizations single grocery store owners have adopted the best features of chain store merchandising, and have secured substantially all the benefits derived therefrom, while at the same time they have avoided the burdens of capital investment, insurance, etc. incident to the car-

> rying of a large stock in a central warehouse, such as maintained by your orator Winn & Lovett Grocery Company, in Jacksonville, Florida, and Sanford, Florida.

It is next shown that the Winn & Lovett Grocery Company found it necessary to maintain a large force of employees and a fleet of trucks to deliver merchandise from its warehouses to its retail units, whereas the "individually owned" stores affiliated as "Better Food Stores", as aforesaid, have no such expense, and can obtain daily deliveries by motor trucks as needed, from the Lewis-Chitty Consolidated Grocery Company, with which they are under contract, as aforesaid.

The bill thus makes a complete showing of how the voluntary grocery chains in Florida are not only paralleling the regular grocery chains in the adoption of improved retail practices, but have even acquired superior advantages, such as above stated in the bill, and besides, have the good will and personal interest of the individual owners, as compared with the hired managers of the regular chains.

Section XI. of the bill further takes up the activities in Florida of the "Independent Grocers' Alliance," and states the scope and extent of its activities generally throughout the United States, as lately reported prior to the institution of this suit.

> "serving approximately 11,226,000 families, through more than 14,000 retail grocery stores."

The testimony given in the Indiana case showed that this

concern had then affiliated some 10,000 retail grocery stores. The averment in the amended bill shows very rapid progress and enlargement. The plan of affiliation and co-operation of the "Independent Grocers' Alliance" is then set forth in general terms; its extensive advertising system, at an annual expenditure of $557,000,00; its tremendous buying power, etc. It is next shown that that concern is affiliated with one wholesaler in Tampa, Florida, which wholesaler in turn is affiliated with 83 "I. G. A. stores" in Tampa, Florida and surrounding territory. Samples of the advertisements put out by the "I. G. A. stores" are shown as exhibits 6 and 7 to the amended bill. Finally, § XI. of the amended bill, R 32-33 avers

> "That there are many other voluntary chains or cooperative groups in the United States, not only in the grocery business, but in other lines, and the independent store owners so operating have adopted the best features of modern merchandising promulgated by chain or multiple store operators. Some of the methods in which regular chain stores took the lead, and which were then adopted by single store merchants, voluntary chains, or cooperative groups, are as follows:"

The quotation next appearing, R 33 to 34, was taken from pages 17 and 18 of the third "Voluntary Chain" Report by the American Institute of Food Distribution. The foreword by the Executive Committee of that Institute, appearing as a part of that third report, is dated September,

1930. The same foreword shows that the second "Voluntary Chain" Report gotten out by the American Institute of Food Distribution was published in February, 1930. As we have heretofore noted, Dr. Nystrom testified in the Indiana case in January, 1930, and in the course of his testimony, page 103 of the Indiana record, referred to a certain survey having been completed by that Institute. Obviously that had reference to the second report of the Institute completed in December, 1929, but published in February, 1930. And, therefore, the extracts quoted in the amended bill, R 33 and 34, from the third report of the Institute, represent practically one year later in the development of "voluntary chain" activities in the grocery field. As previously noted, Dr. Nystrom also testified that the cooperative movement was spreading over the country

"almost like a tidal wave."

By the time this case is considered by this Court, the "tidal wave" thus spoken of will have been in progress practically three years since the period of which Dr. Nystrom testified, and since the period upon which the decision in the Indiana case was predicated. It becomes necessary, therefore, for the Court to consider not only the showing made by § XI. of the amended bill, as above explained, but also more recent studies, such as reports of the Federal Trade Commission, and further reports by the American Institute of Food Distribution, in order for the Court to be fully advised of the "present state of the art."

Muller v. Oregon, 208 U. S. 412, 419, 420;
Standard Oil Company v. United States,
283 U. S. 163, 171, 172, 176, 177 and 178;
and footnotes 5, 6, 10, 11, 14, 16 and 17.

The quotations, R 33 and 34, from the third report of the American Institute of Food Distribution, constitute a deadly parallel, showing how completely modern practices of retail merchandising, capable of local application, have been appropriated and applied by voluntary chains. The amended bill, R 34, then further complains:

> "That although members of such voluntary chains or cooperative groups are doing business in the same way, and have adopted the same features of merchandising first promulgated by chain store operators, the said Act of which your orators complain undertakes to impose excessive burdens of State license taxes provided for by brackets 1 to 11, inclusive, of section 5, of said act, upon your orators and other chain store operators similarly situated, while not placing the same corresponding burdens upon members of said voluntary chains or cooperative groups."

It is next alleged that the Legislature knew that the "Independent Grocers Alliance" was already operating in Florida, and that the complainants in this suit were already operating in Florida before the passage of said Act, and that said Act was

> "a deliberate attempt to destroy the businesses of your orators, and of other chain store operators similarly situated, by excessive taxation, and to compel them to disintegrate their several businesses and confine their operations to one store in one locality only—",

contrary to the due process clause and the equal protection of the laws clause of the 14th Amendment, etc.

Section IX. of the amended bill explains what was being done in Florida shortly before the filing of this suit by the voluntary drug chain of McKesson & Robbins individually owned drug stores, operated in affiliation with "McKesson & Robbins, Inc." manufacturer and wholesaler, now owning and operating a chain of wholesale drug houses at four points within the State of Florida. The operations of that concern are then explained and illustrated by exhibits 1 and 2 attached to the amended bill. The extent of that concern's operations is alleged to be

> "That the total number of independent drug stores in the United States and elsewhere in like manner affiliated with said McKesson System, is 57,000. This fact was broadcasted to the world in a McKesson radio program on November 2, 1931."

In that paragraph it is also alleged that there are in the City of Jacksonville alone 35 individually owned drug stores affiliated with the McKesson system. Further parts of § IX. of the bill show the nature of the affiliation, and

the mutual benefits flowing to the wholesaler and the individual units by reason thereof; and in the concluding part of § IX. of the bill it is shown that the Legislature also knew when the Act in question was passed that the McKesson-Robbins combination was in operation in Florida at that time.

> "Nevertheless said Act deliberately undertakes to favor individually owned drug stores affiliated with such organizations, as aforesaid, and to impose oppressive, arbitrary and excessive burdens of taxation upon such merchants as your orator Louis K. Liggett Company *simply and only* because without subterfuge they own and operate a number of stores under one ownership and management."

Further and more specific averments as to the non-existence of essential local differences or advantages enjoyed by multiple store owners, as compared with single store owners, operating in Florida, are set forth in § XIV. of the amended bill, R 37 to 49. That section of the bill takes up each alleged difference or advantage discussed by the majority opinion of this Court in the Indiana case, and shows that on account of the "progress in the art", or rather, the progress of the "tidal wave", mentioned by Dr. Nystrom in his testimony given in the Indiana case, an entirely different factual situation now exists in Florida, and, as we shall presently note, the "tidal wave" has been continuing ever since this suit was instituted.

In considering all these averments of the amended bill,

it must be borne in mind that the motion to dismiss, R 77, admits them to be true. Nevertheless, the majority opinion of the Supreme Court of Florida disregarded all and singular the aforesaid admitted facts, and set up its own judicial fiat, predicated upon alleged judicial notice, without any definition as to the basis thereof. We shall now present matters, of which this Court can take cognizance, not only supporting the admitted facts alleged in the amended bill, but further, demonstrating the unsoundness of the conclusions stated by the majority opinion of the Supreme Court of Florida.

In order to more definitely define the development of "voluntary chains" as of the date (January, 1930) testimony was taken in the Indiana case, we respectfully call the Court's attention to the second report of the American Institute of Food Distribution, published in February, 1930, and containing a table on page 8, as of December 1929. Trade journals have frequently been considered by this Court as supplying authentic information in cases dealing with particular trades:

Ohio Oil Co. v. Conway, 281 U. S. text 155, 74 L. ed. Text 780;

St. Louis & O'Fallon R. Co. v. U. S. 279 U. S. text 520, 521, 73 L. ed. text 824, 825;

Standard Oil Co. v. U. S. 283 U. S. text 171, 173, 75 L. ed. text 946, 947.

The foreword to the second report of the American Institute of Food Distribution, by Gordon C. Corbaley, President of the Institute, among other things, says:

"Organizing to parallel the operations of the chains has been going on for several years, but it was not until about *twelve months* ago that the Food Institute began to study and classify this movement, calling it by the now generally accepted name 'The Voluntary Chains'." (Italics ours)

"Thus far voluntary chain growth has been generally *crude and inefficient* . . . . . The controlling fact now coming to be understood is that this groping through into a new basis of merchandising relationship between factors formerly cherishing their independence of each other is a movement that is largely paralleling the development of the older chains and the combined effect of the two is bringing a *great change* in the entire structure of food distribution." (Italics ours)

"The purpose of the Food Institute staff is to develop the facts and to help put them before the trade in such a way as to speed more intelligent action."

"The following pages give the high lights from what is necessarily a continuing work. The growth of the voluntary chains is *moving rapidly*. New facts are developing each day. *Trends* are becoming more definite." (Italics ours)

Such then, is a general statement of the "state of the

are" as of the period about which Dr. Nystrom testified in the Indiana case. The majority opinion, 283 U. S. 535, stating that "in the nature of things" volutary chains could not be

> "as efficiently and successfully integrated as a chain under a single ownership and management,"

was obviously based upon such "crude and inefficient" development of the "voluntary chains" as it then existed. On page 5 of the same report the Institute gives a definition of "voluntary chain" as follows:

> "A voluntary chain is a group of retailers (each of whom owns and operates his own store) either associated with a wholesale grocer, or acting cooperatively, organized to carry on joint merchandising activities and to combine wholesale and retail functions under one control so as to meet regular chain store competition."

That definition has continued to adhere to cooperative groups combining the wholesale function and the retail function, although as we shall now point out, the "voluntary chain" or "cooperative chain" has continued in development and organization.

An official study covering the same period as the second report of the American Institute of Food Distribution, is Senate Document No. 12, Seventy-second Congress, First

Session, being one of the reports of the Federal Trade Commission on the chain store inquiry. That report, like others made by the Commission upon that inquiry, may be judicially noticed.

Swift & Company v. U. S., 276 U. S. text 319, 72 L. ed. text 594; footnote 1;
Standard Oil Co. v. United States, 283 U. S. text 171, 75 L. ed. text 946-947, footnote 6.

The letter of transmittal, dated July 19, 1931, thus defines a "cooperative chain:"

> "A cooperative chain is an association of independent retailers acting cooperatively either by themselves or with a wholesaler to obtain advantages in buying, advertising, or in the performances of other merchandising functions or activities. According to the control of the organization there are two types, the retailer cooperative chain and the wholesaler-retailer cooperative chain."

This is substantially the same definition given for a "voluntary chain" last above quoted from the second report of the American Institute of Food Distribution. The letter of transmittal further states that the scope of the inquiry as to "cooperative chains," included information and data obtained from 319 cooperative grocery chains, with a retail membership of 43,191 independent grocery stores as of the beginning of 1930. The letter also stated that the Commis-

sion estimated there were then (January 1930) in the United States 395 cooperative grocery chains, with an estimated membership of 53,400. As to organization and management, the letter further said:

> "In endeavoring to meet competition as effectively as possible, all types of cooperative chains have attempted in varying degrees to adopt certain policies and methods used by centrally owned chains, relating to uniform features, to managerial services, to supervisors, and in other ways."

The letter then pointed out that the inquiry as to "cooperative chains" had covered "buying and selling methods," "leaders," "advertising," "Private brands," and "financial results." The concluding paragraph of the letter among other things, said:

> "The wholesaler-retailer cooperative is too recent a development to permit any definite conclusion at this time as to which of these two plans of merchandising is more effective in meeting competition . . . . . low cost of merchandise to the retail member is quite probably not the only consideration for the merchandising success of the cooperative chain. The merchandise obtained by the retailer member through the cooperative must be sold by him in competition with other types of retail distributors, and in such merchandising, advertising, store appearance, ar-

> rangement, display, management and supervision are undoubtedly important."

On page 3, footnote 2, and again on page 14, footnote 27, the report proper cites the American Institute of Food Distribution as an authority on "voluntary" or "cooperative" chains, and points out that the Institute's survey as of May, 1930, showed that there were in the United States 551 food voluntary chain organizations, with a total estimated membership of 59,640 retail stores.

At page 6 of the report, it is said:

> "The wholesaler-retailer type of cooperative chain is a group of independent retailers affiliated with a wholesaler for buying, advertising or other merchandising activities."

This definition applies to the "Better Food Stores," described in § XI. of the amended bill.

Page 17 of the report, Senate Document No. 12, presents a table, showing by States the distribution of retail members of food co-operative chains as of January, 1930. Only 26 retail units are reported in Florida, whereas the "Better Food Stores" group, mentioned in § XI. of the amended bill, organized in June, 1931, now has over 250 Florida members in that organization alone.

Pages 18 to 21 of the report discuss the "I. G. A." stores, whose operations in Florida are set forth in the amended bill, R 31 and 32. The amended bill (R 32) alleges:

> "That the selling power of the I. G. A. Organization

> **is very great, as illustrated by the following figures taken from a recent publication:**
> **'During the past year, within a period of one or two weeks, I. G. A. stores have sold 65 carloads of matches, 500 carloads of salt, 100 carloads of toilet paper, 120 carloads of sliced peaches, 150 carloads of macaroni, 4,600,000 of Christmas candy'."**

Page 20, footnote 2 of said report, Senate Document No. 12, shows that the facts so stated in the amended bill, were taken from a pamphlet entitled "Courage to Face the Facts," published in 1930 by J. Frank Grimes, President of the I. G. A. organization.

Pages 50 to 55 of said Senate Document No. 12 discuss food cooperative chain contracts, and forms of such contracts are shown by the appendix. Substantially the same matter is set up in the amended bill, R 30.

Chapter 5, of said Senate Document No. 12, pages 56, et seq. discusses supervision and control of retail members.

Pages 67, et seq. show managerial services to retail members.

Chapter 6 of the report, beginning page 74, discusses buying and selling methods of cooperative grocery chains.

Pages 78 to 83 discuss and point out advantages to members listed as follows: Lower prices; Collective advertising; Improved Store Management; Use of specials; Uniform store appearance; Increasing volume and turnover; Improved competitive position; Exclusive private brands; Improved cooperation; Improved window displays; High quality merchandise.

After having considered the whole field of cooperative grocery chains up to January, 1930, the report, page 180, lists a number of typical responses from retail members, the second, sixth and seventh of which are as follows:

> "2. 'Our group has made it possible for us to secure an equalized price on small purchases, thereby enabling us to do business with a smaller stock and a quicker turnover.' "
>
> "6. Another such retailer is even more specific: 'Life saver. I have one-half the stock I had three years ago, my own brand of goods, more actual cash, no debts, do not fear competition, business growing with no added expense due to proper store management and no costly fixtures.' "
>
> "7. 'The mere idea that I operate a 'chain store' seems to be an asset. Modern store methods and equipment are essential. Business has increased 20 per cent.' "

The data on "voluntary" or "cooperative" chains shown by this Court's record in the Indiana case is very meager as compared with Senate Document No. 12, even as applied to the development of that type of retail distribution up to January, 1930. Hence what we are now pointing out justifies, we think an entirely different conclusion.

The third report by the American Institute of Food Distribution shows much greater progress and much more complete "integration" in voluntary chain organization. In the foreword of that report, dated September, 1930, Mr.

Gordon C. Corbaley, President of the Institute, among other things said:

> "With the distribution of the second publication, in February, 1930, a new note *began to appear in the trade response.* There was less of a tendency to scoff at the inefficiencies of the voluntary chains and much more disposition to feel that here was something that each man had to understand thoroughly if he were to carry on his business intelligently.
>
> "Manifestly, the time had come to put the Food Institute work on Voluntary Chains upon a more intensive basis—to reorganize all of the records to make sure that we had an accurate picture of the entire development and especially to follow the changes appearing in the various organizations.
>
> . . . . . .
>
> "The purpose has been to present a concise picture of the outstanding facts and trends as they now appear—the sort of material that each manufacturer and distributor should have if he is to cooperate effectively with the movement.
>
> "Out of this educational process we hope to speed the period of change and do our part in guiding men through to a more stabilized trade relationship."

In section I. of that report, entitled: "The Purpose of the

Present Food Institute Investigation," it is, among other things, said:

> "The early growth has been largely crude and inefficient; retailers and wholesalers have simply been reaching for something to strengthen their competitive position. . . . . .
>
> "But in *recent months* there has come a realization that all of these efforts are reaching towards one common theory—that men are recognizing the need to abandon some of their individuality, are developing coordination of effort for the purpose of reducing costs through simplifying the wholesale function, and then are following through with joint work to improve retail merchandising.
>
> . . . . . .
>
> The Food Institute staff began, in April, 1930, to make a systematic investigation of what seemed to be the most immediate problems of the *present evolution.*" (Italics ours)

Section II. of that report shows the very thorough manner in which the Food Institute staff pursued its investigation of how voluntary chains operated in the United States.

Section III. of that report shows that as of May, 1930, the Food Institute staff had a definite record of 551 voluntary chains, with an estimated membership of 59,640 retail stores. The distribution of such voluntary chains and the membership therein is shown by table 1, page 8 of that report.

Section IV. of that report shows the three classes of voluntary chains, the most important of which is

> "c. *Wholesaler-sponsored groups*, each organized on the initiative of a wholesale grocer seeking to bring about a more effective combination of wholesale and retail functions through merchandising affiliation with a selected group of retailers."

That class describes the "Better Food Stores" and other such groups mentioned in § XI. of the amended bill.

Section V. of the third report of the Institute is entitled:

> "How Voluntary Chains Are Paralleling the Growth of Centrally-Owned Chains."

Among other things, it is in that section said:

> "Both forms of organization of retail outlets—regular or centrally-owned chain and voluntary chain—have been essentially working toward the same objective, i. e. *the coordination of the supply and selling functions under one control.*" (Italics ours)

In the same chapter, under heading:

> "How Merchandising Progress of Regular Chains Has Been Paralleled by Organization Activities of Voluntary Chains"

we find comparison in buying, management of stores, central supervision, advertising, special deals with manufacturers, private labels, progress into meats, bakery goods, fruits and vegetables, present competitive position, and probable future developments. As before mentioned, parts of that section are quoted in the amended bill, R 33 and 34.

At page 29 of the third report of the Institute, the following subject is discussed:

> "Relationship Between Wholesale Grocers and Their Affiliated Retailers."

On page 30:

> "Conditions in the Contracts."

And in the last half of that page, and page 31, the subject

> "Supervision of Retail Operations"

is discussed. Under that heading, it is, among other things, said:

> "The regular chains have learned that greater efficiency is secured when executive planning, selection of merchandise and the general discharge of the wholesale function is exercised from a central office. . . . . .
>
> "In the *beginning* the retailer groups depended upon meetings of the members and a rather perfunctory contact maintained by circulars from headquarters. . . . . .

> "With the development of more intensive competition it has become increasingly plain during *recent months* that such incidental contact between retailers, and such casual contact by salesmen with retailers, were not sufficient." (Italics ours)

On page 32 of the same report it is further said:

> "The more fully developed voluntary chains sponsored by wholesalers follow regular chain store practice in substituting supervisors for salesmen as the means of education and supervision.
>
> . . . . . .
>
> One of the chief aims of the voluntary chain tie-up is to eliminate the necessity of 'selling' the retailer anything beyond what he needs to serve his trade effectively, and to make the process of securing merchandise as automatic as it is under the requisition system of the regular chain."

In short, that chapter of the third report shows that the "integration" among voluntary chains had even then equalled that of the regular chains. Certainly it had progressed to a point where it could not reasonably be said that there was sufficient difference to warrant a different classification for license taxation purposes. Moreover, as previously mentioned, and as will be hereinafter discussed, *the "integration" of the businesses carried on by nearly*

all of the appellants in this case exists and is enjoyed outside of the State of Florida, and therefore cannot be utilized as a basis for discrimination in Florida license taxes. Pages 36 and 37 of the Institute's third report discusses:

> "Benefits derived by Voluntary Chains from Relations with Manufacturers."

Among other results there listed, as derived from replies obtained from all the grocery voluntary chains then operating in the United States, are: 30 to 50 per cent. reduction in stock; 10 to 50 per cent. increase in volume; a gross profit averaging from 20 to 23 per cent.; elimination of salesmen; regular deliveries; faster turnover; and smaller receivables.

The third report of the Institute covers many other phases in the evolution of voluntary chains. For instance, § VII., beginning page 42, discusses:

> "The Progress of Voluntary Chain Retailers into Handling Bakery Goods, Fresh Meats and Fresh Fruits and Vegetables,"

and it is pointed out that this development had been brought about largely by the demand of the housewife for as little inconvenience as possible in completing her entire food shopping requirements. To meet that demand of the trade, it is pointed out that both voluntary chains and regular chains were rapidly becoming general food stores, which sell not only dry groceries, but bakery goods, meats, fresh

fruits, vegetables, etc., in fact everything desired for the table of the housewife.

Section IX. of the third report is devoted to the subject of

> "Immediate Problems in the Management of the Voluntary Chains."

Section X. discusses:

> "Future Steps in the Evolution of the Voluntary Chains."

Section XI. discusses:

> "The Voluntary Chain Idea in other Forms."

Among other things, it is there said:

> "A new type of grocery chain is in process of building—with necessity and education working together to gradually change the relationship between the affiliated wholesalers and retailers until there arises a voluntary relationship that quite closely parallels the regular chains. . . .
>
> "*Men who formerly cherished their independence and carried that attitude to extremes are coming together on a new basis of association where the wastes in the intermediate*

functions of distribution are being steadily reduced. (Italics ours)

Such, then, was the "state of the art" as of September, 1930.

In December 1932 the American Institute of Food Distribution, still pursuing its studies of the subject, has reported still further progress in voluntary chain organization. Its 4th and latest report shows that the number of voluntary chains in the United States, up to the end of 1931, had increased to 688, as compared with 551 such chains as of May, 1930; also that the number of affiliated retail units had increased to 83,224 stores, as compared with 59,640 as of May, 1930.

As further showing the "state of the art" in Florida at the present time, we have appended under separate cover an "extra" section of the Florida Times Union of Saturday, July 2, 1932, as Appendix B. That "extra" section of Florida's leading newspaper, having a daily circulation of over 50,000 copies, may not be as authoritative as the reports of the American Institute of Food Distribution. Yet if the Court is to be fully advised of the progress of the art in Florida up to within recent months before this case is considered, no other course is open, because the Florida Courts refused to admit any proof, and the showing made by the "Better Food Stores" in that "extra" demonstrates further rapid progress even since the decision by the Supreme Court of Florida on April 4, 1932. Such newspaper data is competent to show economic development.

Frost v. Corp. Commission, 278 U. S. text 549, footnote 35.

The "extra" claims to be the first birthday of the "Better Food Stores," and boasts that within one year that group constitutes

"Florida's Largest Retail Grocery System,"

consisting of 250 stores, distributed throughout the State, as specifically stated on page 3 of the "extra." The "extra" also carries pictures of many of the "Better Food Stores," showing uniform signs over each, character of display, and that, in keeping with the development noted in the Institute's third report, "Better Food Stores" are now general food stores, including meats. On page 3 of the "extra," under the title

"Small Grocery Merchants Are Meeting Competition,"

this group of stores and its wholesaler explain and admit that they are now successfully applying all the best practices of retail distribution in

"mass buying, group advertising, quality foods, and better merchandising, under the Better Food Stores plan."

On page 5 of the "extra" the "Better Food Stores" located in Jacksonville, 50 in number, are specifically listed,

giving the addresses and telephone numbers. As previously mentioned, each of such "Better Food Stores" represents a subtrading center in the Jacksonville area. On pages 6 and 7 of the "extra" is a big birthday advertisement. On page 11 of the "extra," third column, is an article pointing out that the small town grocer has been enabled to compete with the larger store. And finally, on page 12 of the "extra" there is an article entitled:

"Country's Quality Crops Are secured by Over-Sea."

In that article the wholesaler, Lewis-Chitty Consolidated Grocery Company, explains how it does quantity buying, with which to supply the 250 retail units, operating as "Better Food Stores." That it makes a specialty of putting out its canned goods under "Over-Sea" labels; buys pineapple from the Hawaiian Islands, salmon from Alaska, prunes and berries from Oregon, sweet peas from the Great Lakes sections, etc. In short, it claims to buy from the primary sources of supply, and assembles the best quality of goods in its Florida warehouses, for distribution by truck to the retail units in respective territories, thereby enabling the retail units to maintain small stocks, secure a rapid turn over, with all the advantages of chain store operation, less many of the disadvantages of that type of retail operation.

Such being the present "state of the art" as to the operations of "voluntary chains", we respectfully submit that no possible basis exists in Florida at the present time for the discriminatory and unreasonable license taxes im-

posed upon regular chains by the Florida Act in question. The factual situation disclosed by the bill, further supported by subsequent developments now brought to the attention of the Court, demonstrate that the discriminatory and arbitrary license provisions of the Act in question constitute the plainest sort of violation of the due process clause and equal protection of the laws clause of the 14th Amendment.

When the whole field of present day retail distribution is reviewed it becomes apparent that the practices now employed by chain stores in retail distribution, and the practices employed by independents, organized as "voluntary chains," and the practices employed by wide awake single unit independents, all and singular, are conforming to a new order of economic planning promoted and fostered by the Federal Government, and by State governments, particularly since the World War. This is shown by the address of Mr. Hoover, as Secretary of Commerce, on January 14, 1925, partially quoted in the amended bill, R 10 and 11, complaining of widespread economic waste in retail distribution. It is also shown by a book written by Stuart Chase, entitled "The Tragedy of Waste," published in 1925, and we refer in particular to pages 11, 33, 149 and 223 of that book. The same federal activity in economic planning, as applied to retail distribution, is shown by a radio address delivered by Dr. Julius Klein, Assistant Secretary of Commerce, May 4, 1929, in which he advocated the elimination of economic waste in distribution along the same lines as proposed by Mr. Hoover.

See also address of Frederick M. Feiker, Director Bureau Foreign & Domestic Commerce, of the Department of Commerce, made before the Taylor Society, Inc. of New

York City, December 12, 1932, reported U. S. Daily December 13, 1932, page 3, bottom column 3.

The Federal Transportation Act of 1920, § 1 (18) to (21) is another example of a federal effort to eliminate economic waste in transportation, which is closely allied to retail distribution.

Cooperative Marketing Associations, authorized by the legislatures of more than 42 States, is another evidence of the same economic planning, having for its chief object the elimination of waste, and the reduction of the

> "unconscionable spread between what is paid the producer and that charged the consumer."

All of which was reviewed by this Court in the case of

> Liberty Warehouse Company v. Burley T. G. Coop. M. Assn. 276 U. S. 71, 72 L. ed. 473.

The case of

> Lee v. Clearwater Growers Association, 93 Fla. 214, 111 So. 722,

reviewed the Florida cooperative marketing association statute, the chief object of which was to

> "eliminate speculation and waste in such marketing."

The combined result in retail distribution of the ef-

forts made by chain stores, cooperative chains, and independents, in response to the public demand for elimination of economic waste, has been a very great advantage to the consumer public. This fact is well illustrated by exhibit 4 to the amended bill, R 72-A, showing the grocery advertisements put out in Jacksonville, Florida, on September 12, 1931, by chain stores, cooperative chains and independents. A comparison of prices on standard merchandise, described in those several advertisements, will show that the Jacksonville housewife could make her own choice as to what store she would trade in, and get the same benefit of closely competitive prices. It thus appears that when the trends in retail distribution are viewed in their broadest aspects there ceases to be any semblance of a basis for punitive and discriminatory license taxation upon retail distributors, predicated as the Florida Act is, merely upon the number of retail units owned and operated by the same owner.

(4) *Present Economic Conditions -- Falling Prices; Hand to Mouth Buying; Over Night Truck Deliveries for Long Distances; Itinerant Truck Merchants—Give Wide Awake Independents Advantages over Chain Store Retail Distributors, thus demonstrating an Additional Reason why the Florida Penalizing License Taxes on Chain Stores are Void.*

In the last section of this argument we dealt with the "tidal wave" in the organization and development of "voluntary chains." If that argument stood alone it might be urged that such organization was necessary to meet chain

store competition. We now propose to show that such organization is not necessary, but is merely a matter of choice with the individual merchant.

We have shown that retail distribution, particularly during the last several years, has been a state of flux. Such being the case, it becomes necessary to bring our review of economic conditions as nearly up to date as possible—otherwise this court will to a certain extent be passing upon a moot case.

In the first place, recent governmental surveys show that wide awake independents have the advantage.

On June 7, 1932, Dr. Julius Klein, Assistant Secretary of Commerce, addressed the National Conference of Bakery Owners, at Chicago, on the subject:

"The Outlook for Small Business Units,"

and the material parts of his address appear in the U. S. Daily of June 8, 1932, page 1, column 2, and page 3, column 3. The "United States Daily" is a daily mirror of governmental activities. Among other things, Dr. Klein observed that the outstanding advantage of the small concerns over the big fellows in the same field is

> "quick adaptability . . . The advantages of the small concern become even more obvious during a slump or depression."

The Court judicially knows that since 1928 at least a world wide economic depression of increasing acuteness has prevailed in America and other countries.

Atchison Etc. R. Co. v. U. S. 52 S. Ct. 146,
76 L. ed. 273.

The Court also judicially knows that as a consequence the same period has witnessed a continued decline in market prices of food products and all other commodities. In the face of such decline in prices, said Dr. Klein, the "independent" or small operator, by reason of his greater adaptability, has much the advantage.

Again, Dr. Klein says:

> "One of our leading statistical services very justly remarks that 'the massing of resources does not make for success; it is bringing together sound management ability that counts. In many instances it has been demonstrated that management is more effective in small units than in the giant corporations . . . Good management is the crying need.'
>
> There is no questioning the advantages that accrue with the massed power of large-scale operations—quantity purchasing, economies in overhead, cost curtailments in many directions. But the casualty lists of the past two years record all to plainly the blunt fact that the accumulation of mere bulk as such may well result in increased vulnerability, in a clumsy futility of effort, a lack of quick spontaneous capitalizing of new opportunities . . . But in the buyer's market which is prevalent today the frugal consumer is by no means tol-

erant of any hint that he should suit his sharply impaired requirements to the convenience of industry. The smaller production and distribution unit is under far less rigid requirements to adhere strictly to certain fixed lines of corporation policy."

Again, he says:

"The value of direct personal contact on the part of responsible executives with such shifting markets, as is possible with smaller units, has increased immeasurably during these times of uncertainty . . . And in any matching of quality, whether of wares or of service, the smaller operator is by no means helpless. His proximity to the ultimate consumer is not obscured by the intervention of remote must-be-consulted boards and bankers, and other inevitable accoutrements of bigger business. He is, therefore, able to keep step with demand and thus avoid perilous overloading of inventories. Above all, he is able to foster good will, that invaluable but highly perishable essential."

Again, he says:

"The advantages enjoyed by one small plant are nothing new and do not depend on a general depression by any means. But there is no question that those advantages become more

evident during a slump . . . Another feature of the present situation which favors the smaller, independent operator is his ability to accomplish a quicker canvassing of his more unrestricted sales territories, weeding out undesirable and unprofitable accounts, and concentrate upon serving only the paying ones . . . The independent is at liberty to adjust his methods and his stock to these peculiar tastes, moods and predelictions of his clientele . . . Such action on his part will go far to counterbalance the advantage of large-scale operations possessed by the more complicated business organizations whose competition the independent is called upon to meet. This possibility of rendering a pleasing individual service is, perhaps the greatest asset of the independent business man of today.

For these and other reasons, the average observer who looks at the situation impartially cannot but have faith in the future of the small independent business unit of this country. The vast majority of them, possessing a reasonable margin of capital, with native ability and with willingness to work, to utilize new methods, and to take advantage of new conditions, have as great an opportunity for success today as ever in the past—in fact, a greater opportunity, because of the steady advance in our living standards and our buying power . . .

> There are hundreds of agencies, both governmental and private, eager to supply at very low cost all of the paraphernalia of research, the statistical bases of applied efficiency on these problems of better business methods. In that respect the average small independent today is far better served and equipped than was many a mighty corporation but a decade or two ago. He has, furthermore, right before his eyes the experience, the methods of many of his larger competitors. And there is no copyright on good ideas and sound practices in the fundamentals of right management—selective marketing, accurate accounting, knowledge as to selling costs, well-balanced production and distribution, and so forth . . .
>
> The rapidly spreading networks of fine highways all over the country are contributing along similar lines in facilitating his marketing."

These observations by Dr. Klein, who has actively supervised recent governmental surveys in many phases of retail distribution, should be accepted as authoritative. Certainly he must be regarded as an impartial witness.

In substantiation of the analysis given by Dr. Klein, as above quoted, the Department of Commerce has not merely theorized on the subject, or studied surveys made by it in the field, but it has gone further and established model *single unit* grocery stores in different parts of the

country. The results of tests made of such stores in Norfolk, Virginia, and Charleston, South Carolina, are stated in U. S. Daily for June 30, 1932, page 1, column 4, and page 7, column 1. It is shown that the two model stores, operated along improved lines, such as described by Dr. Klein, have produced gross profits as high as twenty to thirty-three per cent. above sixty grocery stores canvassed in South Virginia and in North and South Carolina. Other advantages have been:

> "Greater visibility of stock, increased convenience for clerks and customers, higher efficiency in filling orders, and greater service for wages paid."

It is also said:

> "The Norfolk and Charleston displays followed the principles developed in the Louisville Grocery Survey, made by the organized grocery trades of the country with the cooperation of the Commerce Department."

Thus it appears that the Department of Commerce has been making an intensive study of retail distribution, particularly in the grocery field. So that the address by Dr. Klein of June 7th, above quoted, represents his conclusions, based upon such studies.

These surveys go further and show that in the face of the existing economic depression and falling markets, the

"independent" actually has many advantages over his chain store competitors.

In the second place, falling prices and over night truck deliveries favor independents.

In Harvard Business Review of July, 1928, Vol. 6, pp. 394 to 400, is an article by Fred E. Clark, entitled:

> "The Causes and Results of Hand-to-Mouth Buying."

He points out that the depression of 1920 and 1921, following the World War, gave great impetus to hand-to-mouth buying, because periods of depression are periods of falling prices. Coupled with falling prices (still prevalent), he points out:

> "With quicker deliveries, the size of orders can be cut down . . . Parallel with this improvement in railroad service has gone the rapid expansion of good roads, the use of the motor truck, and now, the airplane. Rapid delivery in small lots or large seems assured for years to come . . . So long as buyers fear large stocks and manufacturers are competing for business, it is not hard to determine who must carry the stocks, and who will plan methods for rapid delivery from these stocks."

What Mr. Clark said in 1928 along these lines is even more pertinent in 1932, after the depression has been in progress an additional four years.

In the Railway Age of September 26, 1931, at page 485, is an article by Russell W. Talbot, of Yale University, subject:

"Why Shippers Use Trucks."

That article was one of a series of surveys on shipments by trucks between New York and Philadelphia. He points out that the foremost reason given for shipping by truck 100 miles from New York to Philadelphia was *over-night delivery;* next in order was saving in shipping cost; next in order was store door delivery; next, easy settlement of loss and damage; and so on, down to a total of ten reasons.

In the Railway Age of November 7, 1931, beginning page 701 is a copy of an address by J. R. Turney, Vice-President of the St. Louis Southwestern Railroad, delivered before the Associated Traffic Clubs of America, at Tulsa, Oklahoma, on October 28, 1931. His subject was:

"The Motor Truck—A Threat and an Opportunity."

Among other things, he said:

"Why is it so easy for the trucks to take our l. c. l. traffic? The answer is not hard to find . . .

So long as our patrons bought seasonably this constant increase in the size of the freight container was an advantage rather than a handicap. But our patrons no longer buy seasonably. *Ours is the day of reduced inven-*

> *tory and hand-to-mouth buying.* Our cars have become entirely too large for the purchase needs of many of our patrons. The result is that our average box-car load is about 50 per cent of its capacity, and it costs us more to haul our box cars than it does the freight they contain. The truck takes the business by affording a flexible container in units of approximately one-fourth carloads . . . The keystone of the success of the truck is that it can and in many cases does consistently give overnight service within a range of 350 miles."

On January 5, 1932, Mr. Leo J. Flynn, Attorney Examiner for the Interstate Commerce Commission in the matter of federal regulation of motor carriers, I. C. C. Docket No. 23,400, made his report, recommending a co-ordinated plan of transportation. His report included fifty proposals for legislation, designed to promote efficiency. These proposals, including comments on the report as a whole, were published in U. S. Daily for January 6, 1932, page 1, column 5; also in New York Times of January 6, 1932, page 1, and in Railway Age of January 9, 1932, beginning page 74. Mr. Flynn's first and second conclusions or recommendations were as follows:

> "1. The national transportation machine cannot function with progressive efficiency, part regulated, part unregulated; co-ordination of transportation agencies cannot

reach its economic possibilities under this anomalous condition.

"2. *The past ten years have been an era of changing methods of distribution, of merchandising, and of business practices; transportation by motor vehicle being one of the greatest contributing factors to these changes.*" (Italics ours.)

As applied to the independent merchants, all of this goes to show that in Florida, as elsewhere, independent merchants are doing hand-to-mouth buying. We have heretofore pointed out that many State paved highways radiate from the City of Jacksonville. Any merchant within a radius of 100 to 200 miles can telephone his order in on the afternoon of any day, and receive an overnight delivery by truck from the wholesale merchants in Jacksonville the next morning. Since the decision by this Court in Smith v. Cahoon, Florida passed an amended motor truck law regulating contract motor carriers, as well as common carrier trucks, but the contract carriers are not regulated as to rates. Hence with the unemployment situation existing, the independent merchants can obtain an overnight delivery by truck almost at his own price of transportation.

If we did not thus avail ourselves of such data as above pointed out, then by the time hearing is reached in this cause the case would be a year or two behind the actual status of economic conditions, and that is the precise reason why this court reversed the decision of the lower Court in the case of

Atcheson Etc. R. Co. v. United States,
284 U. S. 248, 76 L. ed. 273.

The general observations above noted and drawn from authentic sources are beautifully illustrated as applied to Florida, by a letter of an independent merchant doing business at Crescent City, Florida, 80 miles south of Jacksonville, dated October 8, 1932, incorporated in a paid advertisement, appearing in the Jacksonville Journal (one of Florida's leading dailies) of November 12, 1932, as a part of the propaganda put out by "Peoples Opinion, Inc." an organization promoted by the truck interests of Florida. That letter so published, was in part as follows:

"MILLER'S GROCERY, Inc.
Western Meats, Vegetables, Fruits, Candies
Crescent City, Florida
October 8, 1932.

Peoples Opinion, Inc.,
P. O. Box 1622,
Jacksonville, Fla.
Gentlemen:

Have just read an advertisement of yours in the Jacksonville Journal in reference to the trucking situation.

If you will pardon my reminiscing, can't help but recall the old days in the grocery business when the small grocery merchants were compelled to carry large inventories of goods, when we had to plan our wants way in advance, depending on railroad deliveries which incidentally, have not

been speeded up or improved very much along this line even today. Our capital was necessarily tied up in slow articles when we made a mistake in judgment. Our stock of groceries would often spoil before being sold, we were never able to take advantage of fast moving specialties which nowadays pay us handsome profits and permit rapid turn-overs. This has all been made possible by truck deliveries.

For instance, in my case here at Crescent City, I can phone Jacksonville jobbers as late as five P. M. in the afternoon and order out my next day's supply; when my store opens in the morning Crescent City people not only have a fresh stock to select from, but I have only to buy limited amounts and thus reduce my cost of investment, which enables me to spend more money for improvements and pay employees better salaries, and remain in business.

. . . . . .

It is also fearful to think of what would have happened to us during the past two years when every one was laboring under heavy inventory losses because of falling prices, if that merchandise had been coming to us by the old slow method of transportation. It was bad enough with quick truck delivery.

. . . . . .

Very truly yours

Miller's Grocery, Inc.

Geo. C. Miller. "

The foregoing statements are precisely in accord with what has happened in other places, as shown by the articles above quoted and discussed. We have heretofore pointed out, citing exhibit 3 to the amended bill, that there were on September 12, 1931, sixteen wholesale grocery concerns then operating in the City of Jacksonville. We have also pointed out that the Lewis-Chitty Consolidated Grocery Company has now affiliated with fifty retail independents in the Jacksonville area, and two hundred others in other areas of the State, but that wholesaler is only one of the sixteen. The other fifteen must find business among the independent merchants of the State, and so they must necessarily deal with independents such as the Miller Grocery Company, of Crescent City, and send out deliveries overnight, thus enabling the independent merchant to do business on a small capital, maintain a quick turnover, take advantage of specialties, and thereby avoid all the responsibilities of large buying, and all losses incident to falling prices, etc. Such combination of conditions gives the independent merchant the decided advantage. These, coupled with the personal equasion discussed by Dr. Klein in his address of June 7, above quoted, certainly give the wide awake independent merchant more than an even break against his chain store competitor. The large buying power of a chain store concern counts for nothing as against such economic conditions; in fact, is a positive detriment if exercised. His or its integration of a large number of stores operated in Florida and in other States, likewise counts for nothing; the large capital counts for nothing. The opportunity of the independent merchant, on a buyer's market, to buy late in the afternoon what he wishes to sell

on the following day, and have it delivered overnight by truck, at low transportation cost, outweighs all those things said to be favorable to the chain store owner, even if such chain store owner exercised all those functions within the State of Florida.

Such is the "state of the art" now existing, and this Court is entitled to know these things, even though the decision of the Supreme Court of Florida attempted to shut out all opportunity of proof.

In the third place, independents have the advantage in buying from itinerant motor truck merchants.

This is a development in retail distribution which has come about almost entirely within the last two years. So far as we have been able to find no such factor has yet found its way into any decided case, and no university economist has as yet made any study thereof. And yet, as we shall now point out, this development must be considered in order for this Court to be fully informed as to the present "state of the art" in retail distribution.

On January 4, 1932, The Florida East Coast Railway and other Southern carriers filed a Sixth Section Application No. 5123, with the Interstate Commerce Commission, asking leave, pursuant to § 6 (3) of the Transportation Act, to immediately put in force rates on citrus fruits to all Southeastern States below Virginia at a twenty-five per cent (25%) reduction, and to Seaboard States North of North Carolina, at an immediate reduction of eighteen per cent (18%). The special reasons given by the carriers for such immediate reduction in rates on citrus fruits were thus stated in the petition:

"Inroads made by unregulated carriers in the transportation of citrus fruits from Florida have reached the point that it causes much concern to both the shippers and the carriers. Motor trucks are handling a large volume of this business to points in Southern States, more especially to Raleigh, Durham, Winston-Salem, Asheville, N. C., Knoxville, Harriman and Nashville, Tenn. and East of Nashville, Tenn., Birmingham, Montgomery and Mobile, Ala., including the points named. Records available indicate that there were handled from Florida up to and including December 9th by motor trucks 513,053 boxes of citrus fruits, which is equivalent to 1,425 minimum cars of 360 boxes. This much we have a record of moving by motor trucks. The citrus fruit generally handled by motor trucks is that picked up by itinerants and thrown on the market indiscriminately at any price the fruit will bring and creates a condition whereunder the sale of the fruit through regular channels is, to say the least, hampered and also results in depressing the prices received by the growers."

On January 9, 1932, as appears by U. S. Daily of January 11, 1932, page 8, column 2, the Interstate Commerce Commission authorized the 25% reduction as applied for, same to be effective on fifteen days notice, in order to meet the motor truck competition set forth in the petition. The

carriers' proposal for an immediate reduction to Northern points was denied, and the carriers required to give the statutory thirty days notice. In the same item a part of the petition above quoted was set forth.

On January 23, 1932, as appears by U. S. Daily of January 25, 1932, page 6, column 1, the Florida Railroads filed tariffs with the Interstate Commerce Commission, effective February 22, 1932, reducing rates on citrus fruits to Northern points 18%. The same item recited that the Commission had previously allowed the 25% reduction to Southeastern points, but required the 30 days notice to more Northern points.

On January 30, 1932, as appears by U. S. Daily of February 1, 1932, page 1, column 7, the Interstate Commerce Commission, again refused to permit the 18% reduction to Northern points in advance of the statutory 30 days notice. These several proceedings show that as to Southeastern territory these carriers had been practically deprived of all participation in the citrus fruit movement going out of the State, due to unregulated truck competition—itinerant motor truck merchants—and that they were similarly affected, but in a lesser degree, on the Northern part of the Atlantic Seaboard, even as far as Boston.

The extent of the itinerant motor truck traffic out of Florida, in citrus fruits, during the season of 1931-1932, is shown by the following study by the Florida Department of Agriculture, in an item appearing in the U. S. Daily for September 15, 1932, page 2, column 2:

" Florida Studies Movements of Citrus Fruit by Truck

From September through December, 1931, the Florida Department of Agriculture tabulated daily the truck passings of citrus fruits, and says that in this four month period 833,572 boxes of oranges, grapefruit and tangerines moved by truck.

Twenty-seven states other than Florida received these truck shipments. Massachusetts, Michigan, Nebraska and Wisconsin are included in the list, but the States nearer Florida received the largest volume.

According to the volume received, Georgia ranked first, then South Carolina, Alabama and Tennessee. The ranking cities were Atlanta, Savannah, Birmingham, Augusta, Charleston and Greenville.—(Department of Agriculture). "

Such official studies and bulletins by Executive Departments either of the Federal Government or State Government, are competent for consideration by this Court.

Standard Oil Co. v. U. S. 283 U. S. 163, 176, 177, 178; footnotes 11, 14, 16 and 17.

It is common knowledge that the citrus season in Florida is only about half over at the end of December, and the figures contained in the above item take no account of the truck deliveries to Florida points such as Jacksonville and other North Florida cities. Hence the fair conclusion is that the truck movement of Florida citrus fruits during

the 1931-1932 season approximated two million boxes. If the truck movement had practically eliminated railroad traffic in that commodity to all the Southeastern States it is a fair deduction that the truck movement has eliminated railroad traffic to North Florida points as well.

Early in November, 1932, Southern carriers, still unable to regain their traffic in Florida citrus fruits to Southeastern States, still further reduced their rates—this time 35% of the 1931 rates, and even that will not suffice. However, the point here is not the effect on railroad revenue, but instead, on markets and retail distribution.

The citrus fruit trucker buys cull fruit from the packing houses, or buys fruit direct from the grove owner, and then loads the fruit in his truck in bulk, without washing if bought from the grower, and without the expense of wrapping, crating, etc., which aggregates in case of railroad shipments about $1.00 per box. He can still compete with the railroads as to cost of transportation, even since the railroad rates are reduced, so that when he gets to points of disposition he can undersell anything transported by rail, starting as he does, with an advantage of $1.00 per box. The result is that the market in the Southern States for citrus fruits has been killed, except that which moves by truck under chaotic conditions.

It is also a fair deduction that the horde of trucks carrying citrus fruits out of the State would not come back empty if they could profitably come back loaded, and so we may conclude, as is the fact, that a large percentage come back loaded with apples from Virginia, and even as far as Delaware; also corn from the Carolinas; sweet potatoes, syrup, poultry and eggs from Georgia, and so forth. These

commodities are sold by truckers to retail merchants in Florida just as the citrus fruits are sold by them to retail merchants throughout the Southeastern States. Every such itinerant trucker hauling fruit and other commodities is a wholesale and retail merchant, whose place of business is the public highway. It makes no difference to him whether the grocery man to whom he sells his load, or half a load, is an independent single store merchant, or the manager of some unit of a chain store enterprise. All he wants is cash for his load, or part of load, so that he can immediately return to the source of supply for a like performance. In the face of declining prices, in a measure produced by such itinerant truckers, the independent retail store operator again has the advantage for the reason that a part of the requirements of a chain store operation is to buy in sufficient quantities to insure a supply for all of the retail units, and if the price goes down a quantity purchase produces a heavy loss. That element applies to Florida retail merchants, not only in citrus fruits, but as well, to all products of other States brought into Florida by itinerant truck merchant operations.

This itinerant truck merchant development is not local to Florida. On June 13, 1932, the Department of Agriculture of the State of Ohio issued the following bulletin on the same subject:

"Better Farm Products for Ohio Consumers — Better Prices for Ohio Producers

OHIO STATE DEPARTMENT OF AGRICULTURE

COOPERATING WITH
THE UNITED STATES DEPARTMENT OF
AGRICULTURE
I. S. Guthery, Director
DIVISION OF MARKETS
Weekly Bulletin

BULLETIN No. 159 Monday, June 13, 1932.

Every large produce market in the country is passing through periods of demoralizing prices, due to unregulated motor truck transportation. These periods occur with such irregularity that they have practically forced the old law of *supply and demand* out of the picture.

Under the present conditions the problem of maintaining any regular flow of agricultural products from the producer to the consumer is hopeless. There is either a feast or a famine. If it were possible to pass the low price, prevailing on any market, due to heavy unexpected motor truck arrivals on to the consuming public there might be some redeeming features to this picture, however, this is usually impossible for the product forced on to the market suddenly and unexpectedly usually deteriorates before it can pass through the channels of consumption even at prices far below the cost of production. The next day these unregulated trucks bury some other market with an avalanche of products. As a result buyers are continually between the "Devil and the Deep Blue Sea." They don't dare buy when they can and can't when they want to.

The Ohio Division of Markets has no criticism to a regulated economic system of motor truck transportation. For over a year we have been continuously warning our producers of this situation. We have personally warned our agricultural leaders and the menace is increasing instead of decreasing. The Ohio Division of Markets cannot fight this situation single handed.

Ohio's produce markets are in the most demoralized condition they have ever been, and this condition will grow worse in place of better unless supplies can be regulated in a more orderly manner than at present, and this cannot be accomplished unless reasonable and equitable restrictions are placed on our present unregulated system of motor truck transportation.

E. A. Fleming, Chief,
Division of Markets. "

In the midst of this chaos in marketing, the independent merchant, who has gotten into the habit of hand-to-mouth buying, has a big advantage over the chain store owner.

The major part of the Ohio Bulletin was quoted in the Railway Age of July 16, 1932, page 93.

It is common knowledge that the vegetable industry of Florida, and the raising of small fruits, such as strawberries, exist in the southern end of the Peninsula. Therefore, it is fair to conclude that the condition which exists in Ohio relative to all classes of fruits and vegetables and farm products, exist in Florida in the movement of fresh

vegetables, small fruits, etc. from the lower end of the Peninsula to retail merchants in the northern part of the State. In season, itinerant truckers supply Florida merchants with peaches, watermelons, cantaloupes, pecans and other products from Georgia and the Carolinas.

The State of Minnesota is having the same trouble from itinerant motor truck merchants to such an extent that on September 16, 1932, more than four thousand citizens met in the City of St. Paul and formed a "Ship by Rail Association." Proceedings of that meeting are set forth in the Railway Age of September 24, 1932, pages 435 to 437.

Pennsylvania and other eastern States are having the same troubles in the cement industry, and in the marketing of fruits and vegetables. See address by W. W. Attebury, of the Pennsylvania System, Railway Age of April 2, 1932, page 575.

Testimony to the same effect was given by J. R. Van Arnum, Traffic Manager of the National League of Commission Merchants, before the Senate Interstate Commerce Committee, on March 22, 1932, in a hearing upon the Couzens Bill (S. 2793), proposing interstate regulation of motor trucks. See U. S. Daily, March 23, 1932, page 1, column 6. Mr. Van Arnum's testimony appears in Part 3 of the printed hearings on the Couzens Bill, before the Senate Committee on Interstate Commerce, pages 461 to 479.

California's position relative to retail distribution, and also wholesale distribution, of fruits and vegetables, is much like that of Florida. It appears by the U. S. Daily of December 1, 1932, page 1, column 5, and page 6, column 1, that on November 30, 1932, Mr. Dudley Moulton, Director

of the California State Department of Agriculture, read a paper entitled:

> "The Uncontrolled Truck and its Effect on Markets"

before a meeting of the National Association of Commissioners, Secretaries and Departments of Agriculture. He pointed out that the rapid growth in the use of motor trucks for transportation

> "appears to be the most outstanding problem before the fruit and produce trade today."

Also he said:

> "The itinerant truckers are at present the targets of much criticism. They are disturbing factors in the producing sections as well as in the distributing centers. By reason of the depressed business conditions and overproduction in many lines, the itinerant trucker has had the opportunity of operating and of establishing himself on a buyer market; and in the districts where his numbers are many there is little left of any stability in methods of doing business or in price levels. He deals frequently with growers who may have need for ready cash or whose products would suffer a heavy cullage if delivered to a resident shipper for grading along established standards."

It is true that the operations of the itinerant trucker merchants affect only food distribution, but it is also true that a very large part of the food bill consists of fresh fruits, vegetables and country produce. It is further true that food distribution constitutes a very large part of all retail distribution, and hence the disturbed economic conditions created by the operations of the itinerant trucker must be taken into account.

The States might be fully justified in imposing a high license tax on such itinerant motor truck merchants, having no place of business except the public highway, and their actions in so doing might be sustained by the case of

Singer Sewing Machine Co. v. Brickell,
233 U. S. 304,

and that might help to cure some of the evils above pointed out. And the States might adopt other regulations which would tend to stabilize markets, and perhaps save some of the traffic for the railroads, rapidly approaching bankruptcy. But while legislative bodies are taking their time to find such remedies, the independent merchant can each day buy what supplies he needs right at his door in anything which may be offered by such itinerant motor truck merchants, and he can do so to an even better advantage than his chain store competitor can do, for the reasons already mentioned.

A consideration of these recent economic developments, together with many other elements previously discussed, and specifically set forth in the amended bill leads, we think, irresistibly to the conclusion that the arbitrary classifica-

tions and discriminatory license taxes prescribed by the Florida Act in question cannot be sustained consistent with the due process of law clause and the equal protection of the laws clause of the 14th Amendment. No sound basis can be found for holding that independent merchants in Florida are entitled to special protection under the wing of such discriminatory regulations.

(5) *A General Survey of the Factual Situation shows that no Taxable Difference Exists between Appellants and their "Independent" Competitors.*

This topic is made a matter of special treatment in § XIV. of the amended bill, R 37 to 49. That section in general points out that chain store methods of distribution have been adopted to meet changed economic conditions, some of which are set forth in § VI. of the bill, and that the chain stores have simply led the way towards the elimination of waste and duplication in retail distribution, with resultant benefits to the consumers of better merchandise at lower prices. That such methods of distribution are open to all, and have been largely adopted, particularly by "voluntary chains."

That section of the bill, beginning R 39, next takes up each alleged difference mentioned in the majority opinion in the Indiana case, and shows that on account of progress in "the art," and otherwise, such alleged differences and advantages, then found to exist in the Indiana case, are not locally enjoyed by appellants severally in Florida.

As to "quantity buying," it is shown that no advantage accrues to appellants severally from their operations in

Florida. It is shown, for instance, that Cohen Brothers, the largest department store in Jacksonville, and a single store operator, has many times greater buying power than Paxson's Inc. whose business, on a $40,000.00 capital, is described in § XII. of the bill, R 35 to 37. Again, as explained in the third report of the American Institute of Food Distribution, pages 36 and 37, the retail units of "voluntary chains" have no need for large buying power. On the contrary, with the wholesaler at their elbows, and making daily truck deliveries, they are able to cut down their stocks 30 to 50 per cent., handle a greater volume of business, and make a more rapid turn over, with an increased profit of from 20 to 23 per cent. That was the situation in 1930. The fourth report of the American Institute of Food Distribution, released in December, 1932, shows still further results along the same lines.

Such are the Florida facts set up in § XIV. (a) of the bill, R 39, and they are admitted by the motion to dismiss.

It must, of course be conceded that some of the appellants have large buying power, but the bill, R 31, shows that "Independent Grocers' Alliance" has a buying power equal to the largest regular chain. Such buying power is in both cases exercised outside of the State of Florida, and is therefore not pertinent when attempting to determine what is a reasonable non-discriminatory license tax to be paid, either by the "I. G. A. Stores" operated in and near Tampa, Florida, or to be paid by the largest chain operated in different counties of the State.

The same sort of comparisons may be made on the subject of "mass distribution," as specifically alleged in §

XIV. (b) of the bill, R 40. Here again, as previously explained, nearly all of appellants exercise the function of distribution outside of the State of Florida, and, if there be an advantage in that behalf, it amounts to a taxable privilege in the State where exercised. In any event, the State of Florida has no right to seize upon that characteristic as justifying the discriminatory license tax now complained of.

The same may be said as to "buying for cash,"—exercised out of the State—§ XIV. (c).

The same may be said as to "selection of merchandise bought,"—exercised outside of the State—§ XIV. (d).

The same as to warehousing of goods and distribution from a centrally located warehouse, where the warehouse, such as Liggett's New York warehouse is far removed from the State—§ XIV. (e).

As to "prices and sales policy," the amended bill, by means of the advertisements in the grocery line, attached and made a part thereof, shows quite clearly that "independent" stores, especially in the food line, and particularly those operating as "voluntary chains," have an even break with "regular chains." All such stores carry special brands, and rely upon various features to attract the trade. The prices on all standard articles, as shown by the advertisements, especially those in exhibit 4, are highly competitive. And again, if there is anything distinctive about chain store sales policy, most of the appellants determine those policies at some central office far removed from the State.

As to "greater turn over," § XIV. (h) of the bill, R 44. it is clearly made to appear that no advantage exists in

Florida. That section of the bill, considered in connection with § XI. of the bill, R 27 to 35, shows that so-called independent grocery merchants now get their goods by truck deliveries from wholesale grocers, in the same way that chain store units get their goods by truck from the centrally located warehouse. And we have already noted that the third report of the American Institute of Food Distribution, and the birthday "extra" of "Better Food Stores," both point out that the capacity of the affiliated wholesaler to make quick truck deliveries, enables the individually owned members of the voluntary chain to produce equally as rapid turn over as any chain store competitor.

The same observations apply forcibly to the matter of "advertising," § XIV. (i) of the amended bill, R 44. In that section it is shown that some of the appellants do very little, if any advertising. As to others, it is shown that advertising in one town will be of no benefit in another town far removed. For instance, the J. C. Penney Company has a store in each of three different counties. As to the grocery business, exhibit 4 to the bill shows that the "voluntary chains" such as "Better Food Stores," are outstripping the regular chains in the matter of advertising, and if further proof or showing as to this point be necessary, all we have to do is to refer to the entire "extra" section of the State's greatest newspaper, of July 2, 1932, appendix B of this brief. Unified advertising is another feature capable of local application, but it is not peculiar to "chain stores." It can be adopted, and has been adopted, by their competitors.

Like observations may be made as to uniform store arrangement and display. The third report of the Food

Institute and the Better Food Stores "extra", previously referred to, both show that independents now affiliated in "voluntary chains," have made great progress along these lines. If they have not yet equalled the attractiveness of chain stores in the matter of display and arrangement of stocks, etc. it is their own fault. But if we take their own word for it, they have already equalled the chain store units in that behalf. That is precisely what is claimed in the article entitled:

> "Small Grocery Merchants are Meeting Competition,"

page 3 of the "extra," Appendix B. Thus again, we find that practices heretofore credited to chain stores as advantages, are, if capable of local application, open to independents, and are actually being appropriated and utilized by independents.

All of these matters of fact, set up in § XIV. of the bill, like other parts of the bill, are admitted by the motion to dismiss.

Finally, it will not do to urge that a large chain store enterprise, by a combination of its resources and methods, is able to realize a larger per centage of profit from its entire enterprise, exercised in many States, and therefore, cannot complain of a proportionately higher license tax by Florida upon the retail units operated within its borders. One answer is, such attempted justification would be predicated upon income, and Art. IX. sec. 11 of the Florida Constitution, provides:

> "No tax upon . . . the income of residents or citizens of this State shall be levied by the State of Florida or under its authority."

That prohibition against income taxes operates not only against measures which would undertake directly to levy that sort of tax, but as well against those which might seek to accomplish the same result indirectly. And therefore, the license tax in question cannot be tested from an income tax basis. It must be presumed that the Legislature did not intend to fly into the teeth of that State constitutional prohibition. Moreover, if some of the appellants derive large incomes from their entire chain store enterprises, operated in Florida and many other States, it is presumed that the States of their domicile will not let them escape from paying appropriate income taxes, as, for instance, the State of New York, where the head offices of most of the appellants are situated.

The case of

> Cotting v. Kansas City Stock Yards Co.
> 183 U. S. 104, 105,

refutes the argument that successful operation warrants the use of the "legislative scalping knife."

In the case of

> Engel v. O'Malley, 219 U. S. 128, 138,

Mr. Justice HOLMES said:

> "It is true no doubt that where size is not an index to an admitted evil, the law cannot discriminate between the great and the small."

It seems to be going far afield to seek a justification for the Florida Act on account of possible greater profit, or possible greater buying power, or possible more skillful management, because all such matters appear to be extraneous. The Florida Act itself, particular sec. 8, pretends to put aside all such tests, and makes the measure of liability a "store" or a *place* where

> "goods, wares or merchandise of any kind are sold at retail."

Since the Statute itself undertakes to measure the burden imposed by the brackets of § 5, according to the number of *places* in which retail merchandise is sold, it would seem to be irrelevant to set up other supposed bases of justification. But in any event, the amended bill presents a Florida factual situation not heretofore considered by the Court, and that factual situation will not justify the discrimination imposed.

(6) *Authorities Relied upon to Support Point 7.*

As applied to the factual situation presented by the record at bar, we now submit that the dissenting opinion by Mr. Justice BROWN, of the Supreme Court of Florida,

concurred in by Mr. Justice ELLIS, 141 So. pp. 161 to 171, represents the only sound conclusions to be reached in this case. Mr. Justice BROWN, 141 So. text 168, very appropriately points out, quoting from both the majority opinion and minority opinion in the Jackson case, that there is very little disagreement as to the principles of law to be applied—the divergence being in their application to the facts. Mr. Justice BROWN also points out, quite appropriately, we think, that in the face of the admitted facts, the Circuit Court of Leon County was in error in sustaining the motion to dismiss, and that the appellees should have been required to answer.

The Florida record shows that the differences, if any, between chain store practices, and those now utilized by their competitors are inconsequential. Where differences still exist, they concern privileges, or supposed advantages exercised and enjoyed beyond the borders of the State, and, therefore, cannot justify a discriminatory Florida License Act. And so, we come back to the fundamental principle laid down in the Coleman case, 277 U. S. 32, 37, that "mere difference is not enough."

The protection of the 14th Amendment against arbitrary discrimination in matters of business, and in the orderly pursuit of the common occupations of life, as announced in the Coleman case, 227 U. S. 32, and as announced in the case of

Quaker City Cab Co. v. Pennsylvania,
277 U. S. 389,

has come to be recognized through a long line of decisions,

which have followed and applied the reasoning of Mr. Justice FIELD and Mr. Justice BRADLEY in the Slaughter House cases, 16 Wall. 36, and in the Butchers Union Case, 111 U. S. 746. Since the Florida record has made it plain that the purpose and effect of the Florida Statute is, under the guise of a revenue measure, to prohibit or restrict the engaging in common occupations of life, we think it profitable to go back and consider the fundamental doctrines so ably expounded by Mr. Justice FIELD and Mr. Justice BRADLEY, since adopted in many decisions of this Court as ruling principles.

In the Slaughter House cases the Court split on the question of whether or not the Louisiana Act of 1869, creating the slaughter house monopoly in the City of New Orleans, should be regarded as a police measure within the competency of the State, or as a restriction upon a common occupation of life, within the prohibition of the 14th Amendment. The majority, speaking through Mr. Justice MILLER, concluded that the Act must be regarded as a police measure within the competency of the State, affecting the civil rights of its citizens, and that this Court would not set itself up as a "perpetual censor" of such legislation. Mr. Justice FIELD and Mr. Justice BRADLEY took a contrary view, and held that the police regulations provided in the Louisiana Act were merely incidental. That the main object and effect of creating the monopoly was to exclude a great number of citizens from the enjoyment of a very common occupation, a right secured to them by the 14th Amendment. Mr. Justice Field pointed out, text 106:

> "So fundamental has this privilege of every citizen to be free from *disparaging and unequal enactments,* in the *pursuit of the ordinary avocations of life,* been regarded, that few instances have arisen where the principle has been so far violated as to call for the interposition of the Courts." (Italics ours.)

At text 109 and 110, he also said:

> "This equality of right, with exemption from all disparaging and partial enactments, in the lawful pursuits of life, throughout the whole country, is the distinguishing privilege of citizens of the United States. To them, everywhere, *all pursuits, all professions, all avocations are open, without other restrictions than such as are imposed equally upon all others of the same age, sex and condition.*" (Italics ours.)

The Louisiana Slaughter House monopoly case was again before the Court in the Butchers Union Company case, 111 U. S. 746. At text 757 Mr. Justice FIELD again said:

> *"The common business and callings of life, the ordinary trades and pursuits, which are inocuous in themselves, and have been followed in all communities from time immemorial, must therefore, be free in this country to all*

> *alike upon the same conditions. The right to pursue them, without let or hindrance, except that which is applied to all persons of the same age, sex and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright.*" (Italics ours.)

Mr. Justice BRADLEY was equally positive. In 111 U. S. text 762, 763, he said:

> "To deny it to all but a few favored individuals, by investing the latter with a monopoly, is to invade one of the fundamental privileges of the citizens, contrary not only to the common right, but, as I think, to the express words of the Constitution . . . The ordinary pursuits of life, forming the large mass of industrial avocations, are and ought to be free and open to all, subject only to such general regulations, *applying equally to all*, as the general good may demand." (Italics ours.)

As applied to police measures, the doctrine of the majority in the Slaughter House cases is still the rule, but as applied to the right of engaging in the common occupations of life, the dissenting opinions of Mr. Justice FIELD and Mr. Justice BRADLEY in the Slaughter House cases, and in the Butchers Union Company case, have been repeatedly approved.

Allgeyer v. Louisiana, 165 U. S. 578, 589-590;
Gulf Colorado Etc. R. Co. v. Ellis, 165 U. S. 150, 155, 159, 160 and 165;
Cotting v. Kansas City Stock Yards Co., 183 U. S. 79, 111, 112;
Southern Railway Co. v. Greene, 216 U. S. 400, 412, 417.

In the case of

Truax v. Raich, 239 U. S. 33, 41,

the Court, speaking through Mr. Justice HUGHES, said:

> "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure."

And in support of that doctrine the Court again cited the dissenting opinion of Mr. Justice BRADLEY in the Butchers Union Company case, along with other subsequent decisions. See also:

Meyer v. Nebraska, 262 U. S. 390, 399, 67 L. ed. 1042, 1045.

As applied to the factual situation presented by the amended bill, and presented by the brief, we think that

Point 7 of this argument, stated pages 85-86 supra, is fully sustained by the following more recent decisions:

Louis K. Liggett Company v. Baldridge,
278 U. S. 105, 72 L. ed. 204;
Fairmont Creamery Company v. Minnesota,
274 U. S. 1, 11, 71 L. ed. 893, 898;
Frost v. Corporation Commission, 278 U. S. 515;
Smith v. Cahoon, 283 U. S. 553, 75 L. ed. 1264;
New State Ice Co. v. Liebmann, 285 U. S. 265,
76 L. ed. 747.

Since the Florida Act does not pretend to be anything more than a revenue measure—in no sense a police regulation—decisions upholding state classifications or regulations as police measures have no relevancy. The sale of groceries, shoes or other merchandise, is a common occupation of life, and the 14th Amendment protects against an arbitrary classification which undertakes to restrict or burdent some of those engaged in such occupations, for the benefit of others; and the State cannot seize upon a mere difference in method of conducting such occupation as justification for such discrimination.

Under the facts as shown by the Florida record, it is not possible, consistent with the doctrines announced in the above line of cases, to justify a statute which will work such arbitrary discriminations as disclosed by tables 1, 2, 3 and 4, presented pages 17 to 19 of this brief. If such a scheme of license taxation can be upheld as applied to places or "stores" where goods, wares or merchandise are sold at retail, then it may be sustained as applied to the taxi cab

Allgeyer v. Louisiana, 165 U. S. 578, 589-590;
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business, and instead of requiring a license fee to be paid by a taxi cab operator based on the size of his business, or the capital stock employed, such business may be arbitrarily loaded down with ascending brackets, such as found in § 5 of the Florida Act, dependent upon the number of taxi cabs operated in a single city, or the number of taxi cabs operated in different cities. Such an Act would be effective to protect the small operator, just as the Florida Act was designed to protect the "independent" merchant. A similar scheme might, in like manner, be applied to the dairy business, and be carried to such extremes as to prevent any dairyman from having more than five dairy cows, or such limited number as the Legislature might by its fiat determine. And thus, step by step, due process of law and the equal protection of the laws, now guaranteed by the 14th Amendment, and embodied in the Declaration of Independence at the time this Nation came into being, would be cast aside, and we would find ourselves back in the Fourteenth Century, when in 1350, the Act of 37 Edward III. was enacted, providing, among other things, as follows:

> "artificers, handicraft people, hold them every one to one mystery, which he shall choose betwixt this and the said feast of the Candlemas, and those who did not so choose and work at the 'one mystery' were punished by imprisonment for half a year and fine and ransom."

In 1899 the then President of the American Bar Association, in his annual address of that year, pointed to that old English Statute as a precedent which might be

resorted to for arbitrary and discriminatory legislation, then being enacted in several states against department stores.

(7) *Anti-Chain Store and Similar Legislation Condemned in Many Cases.*

In the case of

Louis K. Liggett Co. v. Baldridge, 278 U. S. 105, 73 L. ed. 204,

a Pennsylvania Statute, designed as a restriction upon chain drug stores, the business of one of the appellants in this cause, was condemned because plainly arbitrary in requiring every stockholder to be a licensed pharmacist. See also:

Great Atlantic & Pacific Tea Co. v. Doughton, (N. C.) 144 S. E. 701, p. 23 supra;
F. W. Woolworth Co. v. Harrison (Ga.) 156 S. E. 904, p. 24 supra.

In the case of

City of Danville v. Quaker Maid, Inc. (Ky.) 278 S. W. 98, 43 A. L. R. 590,

the Court condemned a statute which undertook to discriminate against "cash and carry" stores, based upon the number of employees engaged in such stores. That decision

is a notable example of where "mere difference is not enough."

In the case of

City of Covington v. Dalheim (Ky.) 102 S. W. 829,

the Court held:

> "A tax on grocers where confined to those employing delivery wagons, is invalid."

In City of Seattle v. Dencker (Wash.) 108 Pac. 1086, 28 L. R. A. (N. S.) 446,

it was held:

> "A license tax on the sale of goods of any kind by means of an automatic device is an invalid classification, being based solely on the *mode of sale*, whether by device or hand." (Italics ours.)

In Moffitt v. City of Pueblo (Colo.) 133 Pac. 754, held:

> "There is discrimination between persons of the same class where a license fee is imposed upon those selling goods from any car, warehouse, private house 'or any other place not kept or directly under his control,' but not on

persons who make such sales from a *place owned* or controlled *by the seller.*" (Italics ours.)

In Chicago v. Netcher, 183 Ill. 104, 48 L. R. A. 261, the Court condemned an anti-department store statute of Illinois.

In Missouri v. Ashbrook, 154 Mo. 375, 48 L. R. A. 265,

the Court condemned a Missouri anti-department store statute. The Missouri Court's condemnation was vigorous in terms. Among other things, the Court said of the statute:

"It shows upon its face that regulation is not its purpose, but that revenue or *undue restriction in the interest of others* not embraced in the class designated is the aim and view . . . *Mere legislative assumption of the right to direct* and indicate the channel and course into which the private energies of the citizen shall flow, or the attempt to *abridge or hamper his right to pursue any lawful calling* or lawful avocation which he may choose without unreasonable regulations, have been condemned in all free governments . . . It is truly *'classification run wild.'* It is *special legislation unrestrained.* (Italics ours.)

(8) *Cases Relied upon by Appellees Distinguished.*

The Appellees contended in the Court below that the decision of this Court in the Indiana case and its decision in the North Carolina case were controlling. We have already sufficiently considered the Indiana case as applied to Point 7 now under discussion. The North Carolina case,

> Great Atlantic & Pacific Tea Co. et al. v. Maxwell, 284 U. S. 575,

affirming the decision of the North Carolina Court, reported 154 S. E. 838, has already been mentioned sufficiently to point out material differences between that case and the one at bar. Nevertheless we apprehend that the decision of the North Carolina Court, affirmed per curiam by this Court, will be strongly urged for the appellees. Hence we shall pause here to note differences in the statutory provisions and differences from a factual standpoint. The statute involved in that North Carolina decision was § 162 of Chap. 345, Laws of North Carolina, 1929, amending the statute which was involved in the Doughton case, 144 S. E. 701. The amended section required the payment of a

> "license fee of fifty dollars ($50.00) on each and every store operated in this state in excess of one."

That amendment did away with any retroactive operation of the North Carolina statute, theretofore complained of with respect to the Act of 1927, and the exemption as to one store existed in favor of every store operator in the State. There was no ascending ratio dependent upon the number of stores operated in a single county, or in different counties, as is the case under section 5 of the Florida Act. Again, the North Carolina Court pointed out (154 N. E. 840-841) other material provisions of the Constitution and statutes of North Carolina. For instance, it was pointed out that the Constitution of North Carolina was amended in 1920, providing that the total state and county tax on property should not exceed fifteen cents (15c) on the $100.00 valuation, and further that

> "The State Tax shall not exceed five cents on the one hundred dollars value of property."

These provisions, the Court pointed out, were a substantial change in the state policy since pursued

> "of raising revenue required for state purposes, by taxing trades, professions and franchises and incomes, leaving to the counties and municipalities of the State, for their support, the tax on property, real and personal."

The Court next observed that section 443 of Chap. 345, Laws of North Carolina, 1929, provided that

> "No ad valorem tax on any property in the state shall be levied for any of the uses of the State."

That provision was passed, as the Court observed, in pursuance of the new State policy put in force by the Constitutional Amendment of 1920. By that section of the Revenue Act of 1920, along with the amendment in section 162, above cited, stocks of goods carried by multiple store owners were fully and completely relieved of state ad valorem taxes, no matter how many such stocks of goods were carried in different retail units. The $50.00 per store license tax on all stores in excess of one, was in its nature *in lieu* of a state ad valorem tax. The Court next observed that taxes for State purposes levied by Chap. 345, Laws of 1929, were (1) Taxes on Inheritances; (2) License taxes on trades, professions and occupations; (3) Taxes on Franchises; (4) Taxes on Incomes. In Florida we have an ad valorem tax on stocks of merchandise, but we do not have any tax upon incomes, the same being prohibited by Constitutional provision (Art. IX. § 11). The North Carolina income tax applies equally to single store owners as to multiple store owners, and thereby tends to equalize the tax burden. This was the ground upon which the Virginia warehouse tax was sustained in the case of

> Great Atlantic & Pacific Tea Co. v. Morrissett, 58 Fed. (2) 991,

discussed pages 43 to 45, supra. Again, by § 153 of the Act of 1929, North Carolina Counties could not levy any

license tax, such as that provided in § 162 for State license taxes. And so, when all those statutory provisions of North Carolina were taken into consideration, there did not appear to be any such unreasonable and arbitrary distribution of tax burden as is provided for under the Florida Act. The situation was practically reduced to the question of whether or not, in view of all the taxing statutes of North Carolina, applicable to retail merchants, the State could, as a reasonable exemption allow one store of every retail merchant to be free of the *State* license tax. The North Carolina Court in substance answered yes, and this Court affirmed its decision.

It has several times been held by this Court recently that a license tax or excise tax may be sustained, if *in lieu of* an ad valorem tax, or other form of taxation, but might not be, if both forms are imposed.

Hopkins v. Sou. Bell Telephone Co.
275 U. S. 393, 72 L. ed. 329;
Great Northern R. Co. v. Minnesota, 278 U. S. 503,
73 L. ed. 477.

The State license tax involved in the Maxwell case, supra, could have been sustained on that theory, if no other. But such is not the case in Florida, because, as already mentioned, Florida has not only an ad valorem tax on stocks of merchandise carried, but the Act now under attack, by the last clause of § 5, imposes an additional license tax of $3.00 per $1,000.00 on the stock carried in retail units and warehouse. On top of all this, § 11 of the Florida Act adds additional county and municipal license taxes.

Counsel for appellees will doubtless urge the case of

Metropolis Theatre Company v. Chicago,
228 U. S. 61.

In that case the City of Chicago passed an Ordinance which provided that

> **"if it be *intended* to produce, offer or present entertainments of the first class,"**

and the highest price of admission is $1.00 or more, the license fee should be $1,000.00; and further that if the highest price of admission exceeded 50 cents, but was less than $1.00, the annual license fee should be $400.00. It is at once apparent that the ordinance was prospective in operation, and theatre owners thereafter had the choice of charging the higher admission fee or the lower, according as best suited their business requirements; whereas here the appellants had no such choice. They were already doing business within the State before the Act under attack was passed, and its provisions became automatically applicable, regardless of what action they might take, other than to abandon their businesses already established.

In the Court below counsel for appellees relied upon a number of police regulation cases, as for example,

Brown Foreman Company v. Kentucky,
217 U. S. 573,

involving the business of rectifying spirits; and

Armour Packing Company v. Lacey, 200 U. S. 226,

involving packing houses—the operation of meat packing houses, and the protection of health; also

Quong Wing v. Kirkendall, 223 U. S. 59,

involving a Montana Act, imposing a license fee upon all persons engaged in the laundry business, other than steam laundries, with a proviso that it would not apply to women so engaged where not more than two women were employed—obviously, a health regulation, in connection with a license tax.

In all such cases a great deal more latitude is allowed to a State Legislature or to a municipality, but in the case at bar, there is admittedly no police feature involved, and hence the question recurs upon the proposition that the Legislature may not, consistent with the 14th Amendment, create arbitrary classifications and glaring inequality of treatment among persons engaged in the same useful calling, such as selling groceries, dry goods or shoes.

The majority opinion of the Supreme Court of Florida, 141 So. 153, 157, 159, is largely predicated upon cases clearly distinguishable. For example, the case of

Toyota v. Hawaii, 226 U. S. 184, 57 L. ed. 180.

First of all, the 14th Amendment does not apply to territories of the United States.

Farrington v. Tokushige, 273 U. S. 284, 299.

Furthermore, it appears that the classification there involved was predicated upon population and difference in value of the privilege. We have many such similar statutes affecting the amount of license fees in the State of Florida, based upon population. See Revised General Statutes of Florida, § 808, automobile agencies; § 822, auctioneers; § 860, laundries; § 891, florists; § 900, gas plants; § 972, shows. But in all such cases the license fee is regulated by the population of the place where the business is conducted, and there is no provision for increase of fee to be paid in one place simply by reason of the fact that the owner operates a similar business in other places in the same County, or in different counties.

The majority opinion of the Supreme Court of Florida, 141 So. 159, also cited

> Pacific American Fisheries v. Territory of Alaska, 269 U. S. 269.

That was clearly a police regulation, because Congress, through its delegated agency, the territorial legislature, had the power to use the license tax, not only to raise revenue, but to restrict the industry, and thereby conserve a *natural resource*. The opinion says:

> "To prevent the territory from doing away with all protection in a short sighted rush for fish."

It thus appears that the statute was designed primarily for the protection of game and fish.

All such cases stand in a class by themselves, as lately recognized by the majority opinion of this Court in

New State Ice Company v. Liebmann,
285 U. S. 262, 76 L. ed. 747.

Counsel for appellees also relied upon Ohio Oil Co. v. Conway, 281 U. S. 146. The Conway case involved a severance tax on oil graded according to gravity, and it was shown in evidence that the value of the oil was graded according to the same gravity—hence gravity was an appropriate and fair means of graduating the severance tax.

It may be that counsel for appellees will cite the last South Carolina Chain Store decision, i. e.

Southern Grocery Stores, Inc. v. South Carolina
Tax Commission, 55 Fed. (2) 931,

referred to in the majority opinion of the Supreme Court of Florida, R 120. First of all, it appears by the opinion that § 1 of the latest South Carolina Statute adopts the scheme of § 5 of the Indiana Statute, and merely extends that scheme to very much higher brackets; whereas, as we have seen, the Florida Statute is hydra-headed—containing several kinds of discriminations. In the next place, the decision of the 3-Judge Court in the South Carolina case was predicated upon a bill praying for injunction against the enforcement of the Act. The opinion indicates that the attack was made primarily upon the face of the Act, and that the bill did not undertake to present any such factual situation as is presented by the amended bill in the Florida

case. As we have seen, the factual situation is all important. Finally, it is to be observed that the 3-Judge decision was rendered on February 2, 1932, and this Court's decision in

Matthews v. Rogers, 284 U. S. 521, 76 L. ed. 447,

was rendered on February 15, 1932. When the decision in the Matthew case was called to Judge Parker's attention he entered a revised order in the South Carolina case, dismissing the bill without prejudice, because, as he interpreted the Matthews case, the Court had no jurisdiction. Thereupon the complainants paid the South Carolina taxes, and forthwith sued at law in the District Court to recover the taxes so paid. That suit at law is still pending, awaiting the outcome of this appeal.

Counsel for appellees may also cite the case of

Penney Stores, Inc. v. Mitchell, 59 Fed. (2) 789,

decided July 7, 1932. The Mississippi statute involved in that case was wholly unlike the Florida Statute, though admittedly directed against the operation of chain stores. The complainant in that suit (not J. C. Penney Company) was the owner of nine grocery stores all owned and operated in the City of Meridian, Mississippi. From that standpoint the case was much like the Indiana case, where Jackson owned and operated all of his grocery stores in Indianapolis. Testimony was taken, but the record even then does not present such a factual situation as is presented by the amended bill at bar, and as presented by this brief. Finally, the Mississippi Statute discriminating against chain

stores was actually repealed on June 1, 1932, by Chap. 91, Laws of Mississippi, 1932, for which reason the decision of the 3-Judge Court, on July 7, 1932, involved a moot question, except as to taxes already payable. The State of Mississippi compromised as to taxes due, and for that reason the appeal to this Court was dismissed by stipulation of counsel in case No. 481, on November 14, 1932, 77 L. ed. (Adv. 147). Such being the outcome of the Mississippi case, there is now in that State no discriminatory statute whatsoever against chain stores.

When we get back to cases that involve what purport to be revenue measures only, the lines against discrimination and arbitrary burdens of taxation are sharply drawn.

Louisville Gas & E. Co. v. Coleman,
237 U. S. 32, 37, supra.

Without extending a review of the decided cases, we respectfully submit that, as applied to the factual situation presented by the amended bill, sub-sections (1), (2), (4), (6), (8) and (10) of Section 5 of the Florida Act, cannot be sustained, consistent with the due process clause and the equal protection of the laws clause of the 14th Amendment.

Point 8.

DAY IN COURT DENIED.—The Supreme Court of Florida Erred by its majority Opinion in Predicating its Judgment upon alleged Judicial Notice, in disregard of the Sworn Facts set up in the Amended Bill and Petitions of Intervention,

admitted by Appellees' Motion to Dismiss, thereby depriving Appellants Severally of their Day in Court—Contrary to the Due Process Clause of the 14th Amendment.

This is a re-statement of the ninth and sixteenth assignment of error, R 174 and 176.

The same point was also presented as points 9 and 10 respectively, pages 13 and 15 of the "Jurisdictional Statement" heretofore filed in this cause.

The matter here complained of is what the Supreme Court of Florida itself did. Complaint as to that matter was first made in § I. of the Petition for Rehearing filed before the Supreme Court of Florida, pages 1 to 5, R 148 to 153. The majority opinion, R 115, (141 So. 158), among other things, said:

> "It is common knowledge that the chain store possesses many distinguishing features that give it an advantage over the independent store dealing in the same commodities. Its method of integration for purposes of co-operative buying, community advertising, traffic in 'selling talk,' displaying, serving the public, unqualified control of wholesaling and retailing, and commanding capital, could under no circumstances become available to the independent store with such results as flow therefrom to the chain store."

It thus appears that the Supreme Court of Florida, speaking through its majority, disregarded the sworn facts set up in the amended bill, and admitted by the motion to dismiss. The factual situation so presented, as we have previously pointed out herein, showed, at least prima facie, that no justifiable basis of discrimination existed between appellants' stores and the stores of single unit owners. The showing so made, as we have pointed out, consists not merely of the pleader's conclusions, but of concrete facts existing in the State of Florida, and illustrated by sundry exhibits attached to and made a part of the amended bill. Notwithstanding all this, the majority opinion, as the quotation last above shows, stated a hypothetical case of its own as constituting the distinguishing characteristics of a chain store. By so doing, the appellants were deprived of all opportunity to meet any such hypothetical case by proof. In short, they were stated out of Court, without any opportunity to be heard.

In discussing the factual situation under Point 7, pages 86, et. seq., supra, we demonstrated, not only from sworn facts set up in the amended bill, but also from economic studies published since the decision of the Supreme Court of Florida, that changes in practices of retail distribution have been moving rapidly. For one thing, that the evolution of the "voluntary chain" has been progressing over the United States like a "tidal wave;" and yet, in the face of such rapidly changing factual situation, the majority of the Supreme Court of Florida, by process of alleged judicial notice, has set up a judicial edict, comparable to a legislative fiat, with no opportunity to be heard, and from which,

in the nature of things, there can be no appeal. We say no appeal, because no means are available by which to test or limit the scope of inquiry supposedly resorted to by the Supreme Court of Florida as a predicate for its alleged judicial notice. We maintain that such a decision carries the doctrine of judicial notice far beyond any legitimate boundary, and operates to deprive the appellants severally of their property without due process of law, contrary to the due process clause of the 14th Amendment.

The right of appellants to complain of such action on the part of the Supreme Court of Florida itself seems to be well sustained by the decision of this Court in the case of

Brinkerhoff-Faris Tr. & Sav. Co. v. Hill,
281 U. S. 673, 74 L. ed. 1107,

third and fourth headnotes (L. ed.) reading as follows:

> "A violation of the due process clause may be accomplished by the state judiciary in the course of construing an otherwise valid state statute."
>
> "The Federal guaranty of due process extends to state action through its judicial, as well as through its legislative, executive, or administrative, branch of government."

The "law of the land" (due process) said Mr. WEBSTER in the Dartmouth College case, "hears before it condemns—proceeds upon inquiry, and renders judgment only

after trial." The Webster definition has been many times approved by this Court. For example, the case of

Hovey v. Elliott, 167 U. S. 409, 418.

In the recent case of

Manley v. Georgia, 279 U. S. 1, 73 L. ed. 575,

the Court held as stated in the second headnote (L. ed.) as follows:

> "A statute creating a presumption that is arbitrary, or that operates to deny a fair opportunity to repel it, violates the due process clause of the 14th Amendment to the Federal Constitution."

In support of the third headnote, the Court speaking through Mr. Justice BUTLER, said:

> "Mere legislative fiat may not take the place of fact in the determination of issues, involving life, liberty or property."

The same doctrines were reiterated in the case of

Heiner v. Donnan, 285 U. S. 312, 76 L. ed. 772.

In the case of

Sterling, Governor of Texas v. Constantin, 287 U. S. ——, decided December 12, 1932,

this Court held that the fiat of a State Governor is not the "Supreme Law of the Land"—that a State Governor cannot by executive order regulate the lawful use of private property.

Arbitrary power thus denied to a state executive and to a state legislature is equally denied to a state judiciary.

Brinkerhoff-Faris T&S Co. v. Hill, supra.

Life, liberty or property cannot be disposed of either by executive or legislative fiat or judicial edict.

We will next inquire what are the limitations of the doctrine of judicial notice?

This question is answered by the leading case of

Brown et al. v. Piper, 91 U. S. 37, 42, 43,

and cases which have followed it, such as Circuit Judge TAFT'S decision in

American F. C. Co. v. Buckskin Fibre Co., 72 Fed. 508, (6 C. C. A.) 2 h. n.

The Court may judicially notice matters of general knowledge and may refresh the judicial memory

"by reference to any printed source of general information known to the court to be reliable."

But "This power is to be exercised by courts with caution. Care must be taken that the requisite notoriety exists. Every reasonable doubt upon

the subject should be resolved promptly in the negative."

The printed sources of information cited under Point 7, such as reports of the Federal Trade Commission, Senate Documents Nos. 100, 30 and 12, and the American Institute of Food Distribution reports, government bulletins, etc. are known by this Court to be reliable. They show that the "requisite notoriety" did not exist to justify the pronouncement of the Supreme Court of Florida, quoted page 206, supra. *If all the matters so stated* by the *Supreme Court of Florida were then notoriously known to everybody, and no longer open to pleading and proof, then the Federal Trade Commission has wasted large sums of money, and over four years time, investigating those very matters, and their investigation is not yet complete.*

Moreover, if the pronouncement of the Supreme Court of Florida is right then all the studies and surveys of retail distribution made in the last several years by the U. S. Department of Commerce, were in like manner wasted effort. Many of such surveys have been cited and quoted in this brief.

In the case of

Bronk v. Chas. H. Scott Company, 211 Fed. 338, (7 C. C. A.)

the Court held as stated in the second headnote:

"Where a bill by its own averment states a prima facie case, it cannot be dismissed by the chancellor on the ground that he judicially

> knows of facts that would support an answer, unless his judicial knowledge is so broad that he can properly hold that no facts exist that would tend to controvert the supposed answer and support a replication and the bill."

In the opinion to which that headnote refers the Court, among other things, said:

> "This is so because, if such facts exist, the complainant is entitled to a hearing where he can present and argue the facts, and such a hearing cannot be had on a demurrer to the bill."

The action of the Supreme Court of Florida was exactly contrary to what the Court in the Bronk case declared to be the right of the appellants.

In the case of

United States v. Wilson, 7 Peters 150, 161,

this Court, speaking through Chief Justice MARSHALL, said:

> "The looseness which would be introduced into judicial proceedings, would prove fatal to the great principles of justice, if the Judge might notice and act upon facts not brought regularly into the cause. Such a proceeding, in ordinary cases, would subvert the best established principles, and overturn those rules which have been settled by the wisdom of ages."

That decision was rendered in 1833, 100 years prior to the consideration of this case—yet we submit, that the doctrine there laid down is still good law, and shows the error made by the majority opinion of the Supreme Court of Florida, in undertaking to dispose of this case by using judicial notice to outweigh the admitted facts set up in the pleadings, which facts are now further supported by additional matters known by this Court to be reliable.
In the case of

Arkansas v. Kansas & Texas Coal Co.
183 U. S. 185, 190,

the Court, speaking through Mr. Chief Justice FULLER, said:

> "And to judicial knowledge, the principle applies 'that the right of a court to act upon what is in point of fact known to it must be subordinate to those requirements of form and orderly communication which regulate the mode of bringing controversies into court, and of stating and conducting them.'"

The same doctrines were declared by this Court in

Interstate Commerce Commission v. L&N R. Co.,
227 U. S. 88, 93, 57 L. ed. 431, 434.

Also in the case of

Chaselton Corporation v. Sinclair, 264 U. S. 543,
549, 68 L. ed. 841, 844.

In the Sinclair case, the Court, speaking through Mr. Jus-

tice HOLMES, noted that the Court might dispose of the case from its own judicial notice, but added:

> "Here, however, it is material to know the condition of Washington at different dates in the past. Obviously, the facts should be accurately ascertained and carefully weighed, and this can be done more conveniently in the Supreme Court of the District than here."

Instead of proceeding in that manner, the Supreme Court of Florida assumed to dispose of this case in a summary fashion on the basis of judicial notice, as previously explained.

The case of

> First National Bank v. Anderson,
> 269 U. S. 341, 354, 70 L. ed. 295, 305,

is a further illustration. That case involved a state statute discriminating against national bank stock, and the question turned upon the use of capital by state banks in competition with that used by national banks. The State Courts, from which appeal was taken, assumed to dispose of the case by resorting to judicial notice much after the same fashion as did the majority of the Supreme Court of Florida. Concerning that matter, the Court, speaking through Mr. Justice Van Devanter, said:

> "As the case now stands, we think no effect can be given to what the state court assumes is the practice of banks in rural portions of

> Iowa in making farm loans as agents of their customers or others. *If there be such a practice it is not a matter which may be noticed and given effect without pleading or proof.* If followed by some banks, it may not be followed by others." (Italics ours.)

So here, the amended bill undoubtedly shows, particularly § XIV. thereof, that the practices used by chain stores themselves are by no means universal. Again, that section of the amended bill, as well as other sections heretofore discussed, show that improved methods of retail distribution, in which chain stores have participated, are not only capable of adoption, but have been adopted by "independent" merchants, and by such "voluntary chains" as "Better Food Stores", McKesson drug stores, and others. Moreover, we have shown by the bill and economic data discussed in this brief, that methods of retail distribution have been undergoing constant change, both on the part of chain store merchants, and so-called "independent" merchants and "voluntary chains." Finally, it has been pointed out that many functions of appellants severally are exercised outside of the State, and, therefore, have no taxable relation to the State of Florida. We, therefore, submit that the court erred, and that all factors of the situation should be carefully developed and weighed. The appellants were denied that right, and we, therefore, submit that the Supreme Court of Florida, by the action complained of, deprived them of due process of law, contrary to the 14th Amendment.

We respectfully submit that the 9th and 16th assignments of error, R 174 and 176, are severally well founded, and that the action of the Supreme Court of Florida complained of in those two assignments, is itself sufficient to require a reversal.

CONCLUSION

At pages 10 and 15 of this brief we stated a summary of the points involved in this argument, and prefixed to this brief we have attached a subject-index and synopsis of the entire brief. By glancing at the synopsis, or by glancing at the summary of the argument, the several matters complained of can be readily and quickly reviewed.

The Florida Act is unlike any other chain store act previously considered by this Court, or previously considered by any other Court. The Florida Act embraces all the different kinds of discriminations which the ingenuity of anti-chain store advocates could suggest. In addition to the differences in the statutory provisions, the amended bill in this case, admitted by the motion to dismiss, presents a factual situation entirely different from any factual situation previously presented to this Court, and in dealing with an economic question, which is in rapid process of change, the factual situation is all important.

We submit that, as applied to the factual situation, the several discriminatory parts of the Act are severally void; that when the invalid discriminatory portions are eliminated the remainder will constitute a result unwork-

able, and not intended by the Legislature, and, therefore, the entire Act must be condemned. That the Act also operates to discriminate against appellants as citizens of other States; that the Act burdens interstate commerce conducted by appellants; that the Comptroller's discriminatory administration of the Act is void; and that the Florida Supreme Court erred in basing its judgment on judicial notice, in disregard of sworn and admitted facts, and contrary also to what this court itself judicially knows.

The total result is that the appellants severally remain subject to the prior license law, which is § 926 Revised General Statutes of Florida, now § 1197 Compiled General Laws, a part of which was quoted page 38 supra. It is clear, therefore, that the several assignments of error are well founded, and that the decision and judgment of the Supreme Court of Florida should be reversed.

Respectfully submitted,

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APPENDIX A

CHAPTER 15624

AN ACT Requiring Licenses for the Operation, Maintenance, Opening or Establishment of Stores in this State; Prescribing the License and Fees to be Paid Therefor, and the Disposition Thereof, and the Powers and Duties of the Comptroller of the State of Florida and the Tax Collectors of the Several Counties of the State in Connection Therewith, and Prescribing Penalties for the Violation Thereof.

Be It Enacted by the Legislature of the State of Florida:

Section 1. That from and after the first day of October, A. D. 1931, it shall be unlawful for any person, firm, corporation, association or co-partnership, whether foreign or domestic, to operate, maintain, open or establish any store in this State without first having obtained a license so to do from the Comptroller of the State of Florida or the Tax Collector of the county in which the same is located as hereinafter provided.

Section 2. Any person, firm, corporation, association or co-partnership desiring to operate, maintain, open or establish a store in this State shall, if the store or stores be all operated within the same county, apply to the Tax Collector of such county, or if more than one store is to be operated and all such stores are not located in the same county, then to the Comptroller of the State of Florida, for a license so to do. The application for a license shall be

made on a form which shall be prescribed and furnished by the Comptroller of the State of Florida and shall set forth the name of the owner, manager, trustee, lessee, receiver or other person desiring such license; the name of such store, the location, including the street number of such store, and the full actual value of the stock of goods, wares, merchandise and commodities from which sales are to be made, including all goods, wares, merchandise and commodities owned by the applicant and held in storage to be sold in or through such store, and such other facts as the Comptroller may require. Such application shall be under oath. If the applicant desires to operate, maintain, open or establish more than one such store, all such stores for which the applicant desires to secure licenses may be listed on one application blank. Each such application shall be accompanied by a filing fee of fifty cents, and by a license fee as prescribed in Section 5 of this Act.

Section 3. As soon as practicable after the receipt of such application, the Tax Collector or the Comptroller, as the case may be, shall carefully examine such application to ascertain whether it is in proper form and contains the necessary and requisite information. If, upon examination, the Tax Collector or Comptroller, as the case may be, shall find that any such application is not in proper form, and does not contain the necessary and requisite information, he shall return such application for correction. If the application is found to be satisfactory and if the filing and license fee as herein prescribed shall have been paid, the Tax Collector or Comptroller, as the case may be, shall deliver to the applicant a license for each store for which an application for a license shall have been made. Each licensee

shall display the license so issued in a conspicuous place in the store for which such license is issued.

Section 4. All licenses shall be issued so as to expire on the 30th day of September of each calendar year. On or before the first day of October of each year, every person, firm, corporation, association or co-partnership having a license shall apply to the County Tax Collector or Comptroller of the State of Florida as the case may be, for a new license for the twelve calendar months next ensuing. All applications for renewal licenses shall be made on forms which shall be prescribed and furnished by the Comptroller of the State of Florida. No license shall lapse prior to the 31st day of October of the year next following the year in which such license was issued, and if by such 31st day of October an application for renewal license has not been filed, the Tax Collector or Comptroller, as the case may be, shall notify such delinquent license holder thereof by registered mail, and if application is not made for a renewal license on or before the 10th day of November, next ensuing, the Tax Collector or Comptroller, as the case may be, must collect, in addition to the license fee hereinafter provided, twenty-five per cent of the license tax provided in this Act before issuing the license. The continuation of the business after the expiration of the time limited in the previous license shall constitute a binding agreement on the licensee to pay such penalty. Each such application for renewal license shall be accompanied by filing fee of fifty cents and by the license fee as prescribed in Section 5 of this Act.

Section 5. Every person, firm, corporation, association or co-partnership opening, establishing, operating or

maintaining one or more stores or mercantile establishments within this State, under the same general management, supervision or ownership, shall pay the license fee hereinafter prescribed for the privilege of opening, establishing, operating or maintaining such stores or mercantile establishments. The license fee herein prescribed shall be paid annually, and shall be in addition to the filing fee prescribed in Sections 2 and 4 of this Act.

The license fees herein prescribed shall be as follows:

"(1) Upon one store, the annual license fee shall be Five Dollars for each such store.

(2) Upon two stores or more, but not exceeding fifteen stores, where the same are located in any one county, the annual license fee shall be Ten Dollars for each such additional store.

(3) Upon two stores or more, but not to exceed fifteen stores, where the same are located in different counties, the annual license fee shall be Fifteen Dollars for each such additional store.

(4) Upon each store in excess of fifteen, but not to exceed thirty, when all are located in any one county, the annual license fee shall be Fifteen Dollars for each such additional store.

(5) Upon each store in excess of fifteen, but not to exceed thirty, where the same are located in different counties, the annual license fee shall be Twenty Dollars for each such additional store.

(6) Upon each store in excess of thirty, but not to exceed fifty, where all are located in any one county, the annual license fee shall be Twenty Dollars for each such additional store.

(7) Upon each store in excess of thirty, but not to exceed fifty, where the same are located in different counties, the annual license fee shall be Thirty Dollars for each such additional store.

(8) Upon each store in excess of fifty, but not to exceed seventy-five stores, where all are located in any one county, the annual license fee shall be Thirty Dollars for each such additional store.

(9) Upon each store in excess of fifty, but not to exceed seventy-five, where the same are located in different counties, the annual license fee shall be Forty Dollars for each such additional store.

(10) Upon each store in excess of seventy-five, where all are located in any one county, the annual license fee shall be Forty Dollars for each such additional store.

(11) Upon each store in excess of seventy-five, where the same are located in different counties, the annual license fee shall be Fifty Dollars for each such additional store.

In addition to the above amounts, Three Dollars for each and every One Thousand Dollars of value of stock carried in each store or for sale in such store."

Section 6. Each and every license issued prior to the first day of April of any year shall be charged for at the full rate, and each and every license issued on or after the first day of April of any year shall be charged for at one-half of the full rate as prescribed in Section 5 of this Act.

Section 7. The provisions of this Act shall be construed to apply to every person, firm, corporation, co-partnership or association, either domestic or foreign, which is controlled or held with others by majority stock ownership

or ultimately controlled or directed by one management or association of ultimate management.

Section 8. The term "store" as used in this Act shall be construed to mean and include any store or stores of any mercantile establishment or establishments which are owned, operated, maintained or controlled by the same person, firm, corporation, co-partnership or association, either domestic or foreign, in which goods, wares or merchandise of any kind are sold at retail. Provided, however, the term "store" shall not include filling stations engaged exclusively in the sale of gasoline and other petroleum products.

Section 9. Any person, firm, corporation, co-partnership or association who shall violate any of the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than Twenty-five Dollars nor more than One Hundred Dollars, and each and every day that such violation shall continue shall constitute a separate and distinct offense.

Section 10. Any Tax Collector knowingly issuing a license to any person when false statements have been made in the application for such license without requiring the correction of such false statement and issuing the license in accordance with the corrected application, and any Tax Collector who knows of any person liable for license tax imposed by this Act or who transacts business without such license in violation of this Act, without giving written notice of such facts to the prosecuting officer whose duty it would be to prosecute such offender, and any prosecuting officer whose duty it would be to prosecute any person for the violation of this Act, after having received written notice from the Tax Collector of the failure of such person to

procure a license, (unless the investigation of such prosecuting officer shall disclose that such person was not liable for such tax), shall be subject to removal from office, and it shall be the duty of the Governor to remove him from office.

Section 11. A County license tax of twenty-five per cent of the State license tax shall be levied and imposed upon each store as herein defined and each incorporated municipality of the State of Florida is authorized to levy a municipal license tax of twenty-five per cent of the State tax imposed by this Act, provided that the tax levied by or for the several counties and municipalities shall be graduated only on the number of stores situate in such county or municipality, respectively, notwithstanding the applicant may own other stores beyond the limits of such county or municipality, as the case may be. In all cases coming within this Section of this Act, where the license must be obtained from the Comptroller of the State of Florida, the county and municipal taxes shall be paid by the applicant to the Comptroller and immediately remitted to the proper officers of the several counties and municipalities of the State.

Section 12. All licenses provided for in this Act shall be issued by the County Judges of the several counties of the State of Florida and turned over to the Tax Collector of their respective counties and the Comptroller of the State of Florida, to be issued and delivered to the licensees upon the payment of the license tax herein provided; provided, however, that before any such license shall be issued and delivered by the Comptroller, or any Tax Collector in the State of Florida, the same shall be countersigned by the

Comptroller or Tax Collector, as the case may be.

Section 13. The County Judge of each county shall be entitled to a fee of Twenty-five Cents for each license issued by him, which shall be paid out of the filing fee herein provided for.

Section 14. All laws and parts of laws in conflict herewith are hereby repealed. This Act shall take precedence over any other Act passed by the Legislature of the State of Florida, at the session of 1931, which may appear to be in conflict herewith, and shall be in full force and effect notwithstanding any provisions of any other Act or part of Act.

Section 15. If any section, provision or clause of this Act shall be declared invalid or unconstitutional, or if this Act as applied to any circumstances shall be declared invalid or unconstitutional, such invalidity shall not be construed to affect the portions of this Act not so held to be invalid or the application of this Act to other circumstances not so held to be invalid.

Section 16. This Act shall take effect immediately upon its becoming a law.

Became a law without the Governor's approval on July 3, 1931.

APPENDIX C

AN ORDINANCE OF THE CITY OF WEST PALM BEACH, FLORIDA, IMPOSING A TAX UPON BUSINESS, PROFESSIONS AND OCCUPATIONS ENGAGED IN OR CARRIED ON EITHER WHOLLY OR IN PART WITHIN THE CORPORATE LIMITS OF SAID CITY, FIXING THE AMOUNT OF SAID TAX FOR THE FISCAL YEAR BEGINNING OCTOBER 1, 1932, AND FOR EACH SUCCEEDING YEAR FOR PERSONS, FIRMS OR CORPORATIONS ENGAGING IN SAID BUSINESSES, PROFESSIONS AND/OR OCCUPATIONS AND MAKING IT UNLAWFUL FOR ANY PERSON, FIRM OR CORPORATION TO ENGAGE IN ANY BUSINESS, PROFESSION OR OCCUPATION WITHIN SAID CITY WITHOUT PAYING THE SAID TAX AND OBTAINING A LICENSE THEREFOR AND PROVIDING A PENALTY FOR ENGAGING IN ANY SUCH BUSINESS, PROFESSION OR OCCUPATION WITHOUT FIRST PAYING SUCH TAX AND OBTAINING SUCH LICENSE AND FOR OTHER PURPOSES.

BE IT ORDAINED BY THE CITY COMMISSION OF THE CITY OF WEST PALM BEACH, FLORIDA:

SECTION 1. That a tax be and is hereby imposed upon every business, profession and occupation engaged in or carried on either wholly or in part within the corporate limits of the city of West Palm Beach, Florida, in the respective amounts hereinafter set forth and that every person, firm, association or corporation engaged in, or carrying on, managing or practicing any business, profession or occupation either wholly or in part within the corporate

limits of said City, be and is hereby required to pay to the City of West Palm Beach, Florida, a tax in the amount hereinafter designated; that the amount of said tax specified hereinafter shall be on the basis of one year but licenses shall be issued as follows: All licenses shall expire on the 30th day of September of each year. No license shall be issued for more than one year; and for each license obtained between October 1st and April 1st the full tax for one year shall be paid, except as hereinafter provided for, and for each license obtained between April 1st and July 1st, One-half the full tax for one year shall be paid except as hereinafter provided for, and for each license obtained between July 1st and September 30th, one-fourth the full amount of tax for one year shall be paid, except as hereinafter provided for: That upon payment of said tax the Tax Collector of the City of West Palm Beach, Florida, shall issue to the person, firm or corporation paying the same, a receipt or license signed by the said Tax Collector which receipt or license shall expire at the end of the period for which the same is issued as hereinabove specified.

Section 2. That the amount which shall be paid by the several firms, persons, associations or corporations engaging in or managing such respective businesses, professions or occupations, be and the same are hereby fixed as follows:

Merchants, retail, (provided license shall permit but one location) when the average value of stocks of goods carried are as follows:	
Not exceeding $1,000.00	$10.00
More than $1,000.00 for each additional $1,000.00 or fraction thereof	1.50

Where more than one store is owned or operated in said City, by the same person, company, corporation or partnership, there shall be charged in addition to the foregoing sum $25.00 for the second such store, $50.00 for the third such store and $50.00 each for all stores in excess of three.

I, Florie Barnes, Deputy City Clerk of the City of West Palm Beach, Florida, do hereby certify that the above and foregoing is a true and correct copy of certain portions of that certain Ordinance passed and Adopted by the City Commission of the City of West Palm Beach, Florida, on the 28th day of September, A. D. 1932.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Official Seal of the said City to be affixed this the 6th day of December, A. D. 1932.

FLORIE BARNES,
Deputy Clerk.

(SEAL)